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UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Petitioners,

vs.

SUN EXPLORATION AND PRODUCTION CO.
a Delaware Corporation, and
SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,

Respondent.

PETITION FOR WRIT OF CERTIORARI: TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the District Court departed from the accepted and usual course of judicial proceedings in granting summary judgment on Count I of Plaintiff's complaint when facts establishing a genuine issue for trial had been conclusively established on previous litigation.

B. Whether the District Court incorrectly granted summary judgment by relying on a case that was still under appeal when it found that Plaintiffs were collaterally estopped from raising claims set forth in Counts III and IV of Plaintiffs Amended Complaint

C. Whether it is an abuse of discretion for a Court to impose Rule II sanctions when any orders or decisions relating to admissibility of evidence are still subject to revision under Rule 54 and Plaintiff proceeds with a reasonable factual theory of the case and an objective belief that unfavorable prior orders were still subject to revision.

D. Whether Rule II sanctions as applied in this case do not comply with Due Process.

STATEMENT OF JURISDICTION

This matter was originally filed in Wayne County Circuit Court, Detroit, Michigan. A timely Petition for Removal to the United States District Court for the Eastern District of Michigan, Southern Division, was filed by the Appellees on February 9, 1987. The basis for such removal was diversity of jurisdiction pursuant to 28 USC §1332(a)(1). The Plaintiff-Appellants are residents of Grosse Pointe, Michigan, and the Defendant-Appellees are incorporated and operate their business in the State of Delaware. Final Judgment disposing of all claims was entered in the District Court on July 8, 1992. The Notice of Appeal was filed on August 4, 1992 in the United States Court of Appeals for the Sixth Circuit pursuant to 28 USC §2107 and FRAP 4(a). The Sixth Circuit issued its final judgment on March 30, 1994.

Writ of Certiorari is requested pursuant to Supreme Court Rule 10.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The United States Court of Appeals sanctioned such a departure by the United States District Court for the Eastern District of Michigan as to call for an exercise on this Honorable Court's power of supervision.

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I. STATEMENT OF THE CASE

The factual basis for this action began in 1971, when the owners of tracts 1, 2, and 6 of the Columbus III oil field in Michigan, the Koziaras, assigned overriding royalty interests in the tracts to the law firm of Dietrich & Schrauger. In 1972, the law firm assigned its interest to Helen Spalter, the mother of plaintiff Edgar Dietrich, for life remainder to Katherine Dietrich, Edgar Dietrich's daughter. On June 1, 1984, Katherine Dietrich reassigned her interest to the Plaintiffs.

Plaintiffs brought this action in Michigan State Court in 1987, alleging that the Defendant oil company had illegally drained oil from the field, had failed to compensate them for oil drained from the field, and had in other ways improperly managed the field. The Defendants removed the case to Federal Court on diversity grounds, and Plaintiffs subsequently filed an Amended Complaint, alleging the following:

> **Count I:** Defendants illegally drained 36,417.5 barrels of oil from the oil field in which the Plaintiffs held an interest during the period from

November 1, 1971 to June 30, 1974;

Count II: Defendants illegally overproduced oil from the field in addition to that alleged in Count I, in breach of their fiduciary duty to the Plaintiffs;

Count III: Defendants negligently or intentionally breached their duty to Plaintiffs by failing to use the care and skill of an ordinary oil producer, including under-reporting oil reserves, sabotaging wells, and persuading witnesses to give false testimony at earlier administrative proceedings;

Count IV: Defendants fraudulently induced Plaintiffs or their predecessors to sign a unitization agreement in 1974.

Count V: Defendants failed to compensate Plaintiffs for 881,071 barrels of oil allegedly produced by Defendants from November, 1984 to March, 1985.

Pursuant to Defendants' first motion for summary judgment, the District Court disposed of Count II in favor of the Defendants. Plaintiffs did not contest the disposition of Count II.

Defendants filed a subsequent motion for summary judgment, which the District Court granted on February 10, 1992 for Counts I, III and IV. See Dietrich v. Sun Exploration and Production Co., 784 F.Supp. 383 (E.D. Mich. 1992). (R.8 Memorandum Opinion and Order)

Subsequent to the February 10, 1992 Opinion and Order Granting Summary Judgment to all claims except those on Count V, the parties, pursuant to an Order of April 14, 1992, appeared at a final pretrial conference on June 8, 1992. The Final Pretrial Order was entered on that date. The Final Pretrial Order did not set the date of trial, but the Court had assured both sides that several weeks' notice would be given to the parties and counsel. (R.7 Amended Order) Plaintiffs were not informed of the date of trial until just a few days before the trial was to commence, when the Court Clerk advised that a jury would be selected on July 1, 1992 and that a trial would start July 2, 1992. On July 1, 1992 Plaintiffs filed two Motions in Limine. One was entitled, "Motion in Limine to Clarify and/or Amend Final Pretrial Order" and the second Motion was entitled, "Motion in Limine Regarding Introduction of the Wronski and Streeter Opinions for the Limited Purpose of Impeachment and Absence of Mistake." In filing these motions, Plaintiffs sought to amend the final pretrial order in order to

correct technical problems with the time period specified in their complaint and to seek an evidentiary ruling on the limited use of a previous case pertaining to the illegal drainage of the same oil field at issue in the instant case by the same Defendants.

The District Court denied both of Plaintiff's motions, as well as Plaintiff's request to adjourn, and granted Defendant's Motion for Summary Judgment as a matter of law. An Opinion and Order was entered on July 8, 1992, and a Judgment of Dismissal executed on the same date. (R.4 Opinion and Order) The Court also imposed sanctions under Rule 11 for Plaintiff's pursuit of Count V, which the Court classified as a factually unsubstantiated claim. (R.3 Opinion and Order Granting Sanctions)

Plaintiffs timely noticed their appeal on August 4, 1992 to the United States Court of Appeals for the Sixth Circuit. On March 30, 1994 the Court of Appeals affirmed the District Court. (R.1 Sixth Circuit Opinion)

Plaintiffs now seek review on Certiorari to the

United States Supreme Court.

II. ARGUMENT

A. IN GRANTING SUMMARY JUDGMENT ON COUNT I OF PLAINTIFF'S COMPLAINT THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BECAUSE FACTS ESTABLISHING A GENUINE ISSUE FOR TRIAL HAD BEEN CONCLUSIVELY ESTABLISHED IN PREVIOUS LITIGATION.

Count I of Plaintiff's complaint alleges that Defendants failed to compensate them for over 36,000 barrels of oil that Defendants illegally drained from Tracts 1, 2 and 6 of the Columbus III oil field between November 1, 1971 and June 30, 1974. Plaintiffs assert that the Michigan Court of Appeals decision in Wronski v. Sun Oil Co., 89 Mich.App. 11 279 NW2d 564 (1979) lv den 407 Mich 863 (1979) (Wronski I) at the very minimum establishes that a genuine issue of material fact exists, and therefore, the granting of Defendant's motion for summary judgment was in error.

In the case at bar, the issue conclusively decided

in Wronski I of whether Appellees drained oil from Tracts 1, 2 and 6 of the Columbus oil field was material because it would have established the cause of action asserted by appellants and precluded appellees from arguing contrary as part of their defense. Indeed, in his February 10, 1992 Opinion and Order, Judge Gadola stated:

> Plaintiff's claim that Defendants drained oil from Tracts 1, 2 and 6 of the Columbus oil field. This has conclusively been established in Wronski I and Defendants cannot re-litigate that issue. (R.8: Memorandum Opinion and Order).

In deciding to grant a motion for summary judgment, the record must demonstrate that no genuine issue of material fact remains, and the record and evidence must be reviewed via the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Anderson v Liberty Lobby, 477 U.S. 242, 249 (1986); Celotex Corp. v Catrett, 477 U.S. 317, 325 (1986); Niecko v Emro Marketing Co., 973 F.2d 1296 (6th Cir. 1992).

In Kendall v. Hoover Co., 751 F.2d 171, 174 (1984): the Court defined "material fact" in the context of a motion for summary judgment as follows;

> **Summary judgment.** In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is "material" if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. Austin v. Wilder, 26 N.C.App. 229, 215 S.E.2d 794, 796. See Fed.R.Civ.P. 56(c).
>
> A fact is "material" and precludes grant of summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights and obligations of the parties. Johnson v. Soulis, Wyo., 542 P.2d 867, 872 (1975).

Appellants were the non-moving parties in the third effort by Appellees at getting the case dismissed without trial. The U.S. Supreme Court has stated the test in

ruling on a Rule 56 motion. In Lujan v National Wildlife Federation, 497 US ____, 111 LEd 2d 695 (1990), the Court said:

> "[11] . . . In ruling upon a Rule 56 Motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment 'shall be entered' against the non-moving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." (111 LEd 2d at p 716).

The Supreme Court in 1986 in a trio of cases stressed the importance of summary judgment procedures

as a means of isolating and disposing of factually unsupported claims or defenses. In Matsushita Electric Industrial Co. v Zenith Radio, 475 US 574, 89 LEd 2d 538 (1986); Anderson v Liberty Lobby, Inc., 477 US 242, 91 LEd 2d 202 (1986); and Celotex Corp v Catarett, 477 US 317, 91 LEd 2d 265 (1986), the Supreme Court outlined the burden that the moving party must carry. The Court in Celotex said:

> "Under Rule 56 (c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning as essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law' because the non-moving party has failed to make a

> sufficient showing on an essential element of her case with respect to which she has the burden of proof." (477 US at p 323, 91 LEd 2d at p 273).

However, in Anderson, supra, the Court, in noting the District Judge's role, stated:

> "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the Judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." (477 US at p 249, 91 LEd 2d at p 212).

Using the facts established in Wronski I and viewing Appellee's Motion for Summary Judgment in the light most favorable to the non-moving party, it is clear that the District Court erred in granting summary judgment on Count I, and in so doing departed from the accepted and usual course of judicial proceedings. Not only did the finding of illegal drainage set forth in Wronski I have the effect of establishing Plaintiff's claim

that illegal drainage of oil occurred during a period of time asserted by Plaintiffs, but the facts found in Wronski I had the effect of refuting Defendant's defense that such illegal drainage did not occur.

The role of the District Judge in determining whether to grant summary judgment is not to weigh the evidence or to determine the truth of the matter but to determine whether there is a genuine issue for trial. In the case at bar it is clear that the District Court erred in granting summary judgment, and this error resulted in a deviation from the accepted and usual course of judicial proceedings. The facts and finding set forth in Wronski I clearly indicate that there was a genuine issue for trial, and as such summary judgment is inappropriate.

The District Court's decision in granting summary judgment and the Court of Appeals sanctioning of this deviation call for an exercise of this Honorable Court's power of supervision and the reversal of the decision granting summary judgment.

B. THE DISTRICT COURT INCORRECTLY GRANTED SUMMARY JUDGMENT BY RELYING ON A CASE THAT WAS STILL UNDER APPEAL WHEN IT FOUND THAT PLAINTIFF'S WERE COLLATERALLY ESTOPPED FROM RAISING CLAIMS SET FORTH IN COUNTS III AND IV OF PLAINTIFFS AMENDED COMPLAINT.

Count III specifically alleged that the defendants incorrectly interpreted geological and reservoir data, failed to represent plaintiffs' interests adequately before the Michigan Department of Natural Resources at the 1974 unitization hearings, under-reported oil and gas reserves, sabotaged a well ("the 6-3 Well") with cement, and persuaded geologists and other witnesses to give false testimony at the unitization hearings. On summary judgment Plaintiffs offered the affidavit and report of Dr. Joshi, a petroleum engineer and expert witness. Plaintiffs argue that the expert's report and opinions create genuine issues of material fact which make summary judgment on Count III improper.

In Count IV, plaintiffs allege that Defendants'

misrepresentation of geological and reservoir data to the Michigan Department of Natural Resources induced Plaintiffs and/or their predecessors to sign the 1974 unitization plan, thereby denying them their fair share of the unitization production. In effect, Plaintiffs challenge the fairness and validity of the 1974 unitization plan. Plaintiffs again relied on statements and conclusions of their expert witness' affidavit to create material issues of fact.

The District Court found that Plaintiffs claims were collaterally estopped by an Administrative Law Judge ruling which was part of a case involving the Appellees, and therefore, the ruling in Wronski v. Sun Oil Co., 108 Mich 178, 310 NW2d 321 (1981) (Wronski II) collaterally estopped Plaintiffs' claims in Counts III and IV. Plaintiffs assert that they not only had sufficient evidence to create material issues of fact, but that the reliance on Wronski II was improper because Wronski II was currently under appeal and was not a final determination of the case.

Because the court was sitting in diversity and was considering the effect of a prior Michigan State Court judgment, Michigan law controls the law of collateral estoppel. Erie Railroad Co. v Tompkins, 304 U.S. 64, 78 (1938).

Under Michigan's law of collateral estoppel, when the initial forum is an administrative agency, the doctrine of collateral estoppel applies only when the procedures are adjudicatory in nature, when a method of appeal is provided, and when it is clear that the legislature intended to make the determination final in the absence of an appeal. Nummer v Treasury Dept., 200 Mich App 695 (1993); Storey v Meijer Inc., 431 Mich 368, 429 NW2d 169 (1988); Senior Accountants, Analysts & Appraisers Ass'n v Detroit, 399 Mich 449, 457-458; 249 NW2d 121 (1976)

In the case at bar, the District Court granted summary judgment upon Appellee's motion that Appellants were collaterally estopped by a case (Wronski II), that was currently being appealed before the

Michigan Supreme Court. As Michigan law requires that the determination be final only on the absence of an appeal, the granting of summary judgment based on collateral estoppel did not fully comport with the requirements of Michigan's law of collateral estoppel and therefore the granting of summary judgment on Counts III and IV constitute a gross departure from the accepted and usual course of judicial proceedings as to call for this Honorable Court's power of supervision and a reversal of the lower Court's decision.

C. IT IS AN ABUSE OF DISCRETION FOR A COURT TO IMPOSE RULE 11 SANCTIONS WHEN ANY ORDERS OR DECISIONS RELATING TO ADMISSIBILITY OF EVIDENCE WERE STILL SUBJECT TO REVISION UNDER RULE 54 AND PLAINTIFF PROCEEDED WITH A REASONABLE FACTUAL THEORY OF THE CASE AND AN OBJECTIVE BELIEF THAT UNFAVORABLE PRIOR ORDERS WERE STILL SUBJECT TO REVISION.

Plaintiffs and their counsel were sanctioned under Rule 11 of the Federal Rules of Civil Procedure for pursuit of an allegedly factually unsubstantiated claim. The Court imposed $19,735 in Rule 11 sanctions for Plaintiff's conduct in pursuing Count V from February 1992 (when all Counts except Count V were dismissed) until July 2, 1992 (the day set for trial). (R.3 Opinion and Order Granting Sanctions)

Plaintiffs assert that the Court abused its discretion in imposing sanctions because Plaintiffs had a reasonable belief that their motion to amend or clarify their pleadings would be granted and because under Rule 54 the previous orders of the Court were still subject to

revision pending a final adjudication of the case. Moreover, when the Court refused to grant its motions, counsel for Plaintiffs complied with the admonition of Rule 11 and candidly admitted in open court that Plaintiffs did not currently have evidence to support its allegations set forth in Count V. (R.5, Transcript, P.)

Ordinarily a District Court's imposition of Rule 11 Sanctions is entitled to deference and may not be disturbed except for abuse of discretion. Stevens v. Lawyers Mutual Liability Insurance Co., 789 F2d 1056, 1060 (4th Cir. 1986); Mann v. G & G Mfg., Inc. 900 F2d 953, 959 (6th Cir. 1990). Under Rule 11 a Court must examine the objective reasonableness of the claims in light of existing law and facts. Michigan National Bank v. Kroger Company, 619 F.Supp. 1149 (ED Mich,, 1985).

When evaluating a Rule 11 motion for sanctions, the district court "measure(s)" the conduct of the non-moving party's counsel "by an objective standard of reasonableness under the circumstances." Mann v G &

G Mfg., Inc., 900 F2d 953, 961 (6th Cir. 1990); INVST Financial Group, Inc. v Chemical Nuclear Systems, 815 F2d 391, 401 (6th Cir. 1987) cert. denied, 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed. 2d 251 (1987); Albright v Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986).

The District Court then weighs the evidence to determine if counsel's pleadings, motions or papers are well-grounded in fact or warranted by existing law. Westmoreland v CBS, Inc., 770 F2d 1168, 1174 (D.C. Cir. 1985).

In the case at bar, the District Court decision in imposing FRCP 11 Sanctions was an abuse of discretion because the Court failed to inquire what was reasonable and objective to believe at the time the Motion to Amend was submitted. Eavenson, Auchmuty and Greenwald v. Holtzman, 775 F2d 535 (CA 3, 1985).

In the instant case, it is certainly arguable on an objective basis that Appellants could reasonably conclude that a motion for an amendment to clarify a defect in the pleadings would be granted. It is well established that a

trial judge possesses the discretion to allow or prohibit parties from raising matters not raised in the pretrial order. Sample v Diecks, 885 F2d 1099, 1106 (3rd Cir. 1989). Moreover, under Rule 54 of the Federal Rules of Civil Procedure any orders are subject to revision at any time before the entry of judgment adjudicating all the claims of the parties. FRCP Rule 54 states as follows;

> (b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims

> or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the case at bar, Appellant's counsel, at the time of the submission of the Final Pretrial Order, clearly had the right to file a motion to amend. Appellant's counsel attempted to rectify a technical defect by filing a motion to amend to broaden the specified time period within which Appellants reasonably and objectively believed that Appellees had wrongfully produced oil. (R.6, Final Pretrial Order).

When the Court indicated that it was not amenable to or would not allow such an amendment, Appellants' counsel candidly admitted that he would be able to establish a time period prior to that recited in Count V but did not have evidence to support the specific allegation recited in Count V.

In the Committee Comments relative to Rule 11, the Committee indicated its intent as to when a party

should be subject to Rule 11 sanctions;

> "These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."

Appellants reasonably and objectively had reason to believe that the trial judge would exercise his discretion and allow Appellant's motion to amend and adjourn trial to permit a proceeding fair to both parties.

When the court indicated that it was not amenable to or would not allow such an amendment, Appellant's counsel represented in open court that he was unable to prove Count V. (R.5 July 2, 1992 Transcript, p. 37 and 48).

Appellees then moved for a judgment as a matter of law pursuant to FRCP 50(a) and the court granted the motion. Following dismissal of Count V the District Court imposed sanctions under Rule 11 against Appellants for pursuing Count V. (R.2 and R.3 Opinion

and Order)

The District Court's analysis suggests that different panels have reached differing results with respect to sanctions under these circumstances. In the case at bar, the District Court relied principally on Mann v. G & G Mfg., Inc., 900 F2d 953 (CA 6, 1990). In Mann, this Court stated:

> "We must grant the district court wide discretion to determine whether the conduct of plaintiffs' counsel was reasonable. The district court, however, 'is expected to avoid using the wisdom of hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted'". 900 F2d at p 958.

Under the language of Rule 54 it was objectively reasonable for Appellant to expect an opportunity to amend his pleading to correct technical problems with the complaint and to seek a revision of the court's previously entered orders. When Appellant's motion was denied, Appellant complied with the admonition of Rule 11 and candidly acknowledged that he did not have enough evidence to support the specified allegation and the

complaint was dismissed. Under the circumstances, the District Court's imposition of sanctions pursuant to Rule 11 constituted an abuse of discretion.

D. ADMINISTRATION OF RULE 11 SANCTIONS DOES NOT COMPLY WITH DUE PROCESS.

The administration of Rule 11 sanctions as they existed at the time sanctions were applied in the case at bar (and, as to the argument here advanced, at the present time) provides that the same judge who presides over the Court proceedings during which the questioned pleadings or conduct takes place determines whether to sanction that conduct and the appropriate sanctions.

Appellant here argues that there are two competing forces which come into play in administration of Rule 11 sanctions. On the one hand the trial judge best knows the extent, 'willfulness', and harmful extent of the questioned pleading or conduct. On the other hand the trial judge, as a matter of human nature, will have invested a measure of the judge's own emotional energy into the judge's rulings or position on the law. He will have a certain 'stake' in the outcome. It is human nature

that a judge is more likely to sanction a pleading or conduct the judge considers wrong because the judge disagrees with the pleading or conduct. The more forcefully litigant or litigant's counsel maintains the position opposite to that of the judge, the more likely the judge is to assess sanctions. Appellant submits that there is a reasonable way to avoid this potential prejudice. Appellant suggests that before sanctions are sought which could result in dismissal of a case or award of more than $2,500 in monetary sanctions, the matter should be determined by a three judge panel. The trial judge would be one member and two other members of the Court would also be appointed. This way the trial judge could express his arguments for sanctions but the other judges could provide more objectivity since they would not have the potential emotional stake in determination of the sanctions.

28 U.S.C. §455 (a) provides:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any

> proceeding in which his impartiality might reasonably be questioned."

Note that Appellant does not argue that the trial judge should be disqualified, but rather that his views be tempered by adding additional judges to the deliberations. Thus the case authority which holds:

> "Adverse legal rulings made by the judge, either in the case itself or in earlier related proceedings, do not constitute a basis for his disqualification under the statute, even though such rulings may have been erroneous."

2ALR Fed §917

are not dispositive of what Appellant urges here.

Somewhat analogous to what Appellant argues here is the issue of contempt, and whether the judge against which the contempt is shown may try the issue of sanctioning the contempt. See, for example, 'Contempt - Disqualification of Judge' 64 ALR 2d 600. See also 'Contempt - Summary Power' 3 L ed 2d 1855. As these, and various citations under 18 USC §401 make

clear, this does not appear to be a settled area of the law. Basically the current law on disqualification of Judges is as set forth in Schwartz, 'Disqualification for Bias in The Federal District Courts' 11 Univ Pitt L.Rev 415 (1950):

> If there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."

(Quoting from Law v. Chartered Institute of Patent Agents (1919) Z Ch 276, 289.

It is the appearance of bias as well as bias itself which must be avoided.

> "Due process requires that the tribunal be a fair and impartial one."

16 A Am Jur 2nd Constitutional Law §855

Appellant here urges that there is at least an appearance of unfairness by having the same judge who presides over the Court proceedings during which

questioned pleadings or conduct are involved determine, solely, whether to sanction that conduct and the appropriate sanctions. That appearance can be minimized by having a three judge panel, including the trial judge, decide the most serious sanctions issues.

III. CONCLUSION

Plaintiffs respectfully request that the United States Supreme Court grant Certiorari and remand the matter to District Court for trial on the merits and set aside the award of sanctions.

Respectfully submitted,

June 27, 1994

Stephen R. Baylerian (P41862)
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Appellants

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Description Of Entry	Filing Date	No.
Opinion, Sixth Circuit Court of Appeals	March 30, 1994	R.1
Order Directing Plaintiffs to Pay Sanctions to Defendants	Feb. 26, 1993	R.2
Opinion and Order Granting Defendants' Motion for Sanctions	August 28, 1993	R.3
Opinion and Order Denying Plaintiffs' Motions in Limine, Denying Plaintiffs' Motion to Adjourn, and Granting Defendants' Motion for Judgment as a Matter of Law	July 8, 1992	R.4
Transcript	July 2, 1992	R.5
Final Pretrial Order	June 1, 1992	R.6
Amended Order	April 14, 1992	R.7
Memorandum Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment	Feb. 10, 1992	R.8

NOT RECOMMENDED FOR PUBLICATION R-1

No. 92-1981/93-1442

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MARCH 30, 1994

Leonard Green, Clerk

Edgar J. Dietrich and)
)
Theresita Dietrich,)
)
Plaintiffs-Appellants,)
)
vs.

On Appeal from the United States District Court for Eastern District of Michigan

)
Sun Exploration and Production)
Company, a Delaware corporation,)
and Sun Operating Limited)
Partnership,)
)
Defendants-Appellees.)
)

Before: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges.

MERRITT, Chief Judge. This action involves plaintiffs' royalty interests in tracts of land in the Columbus III oil field in St. Clair County, Michigan, which is leased to and operated by defendants. Plaintiff sued, alleging in a five-count complaint various forms of misrepresentation and mismanagement of the field. After five and one-half years of discovery, the district court granted judgment for the defendants. Plaintiff appeal and court's judgement on four counts of their complaint, and appeal sanctions assessed against them for abusive litigation practices and under Rule 11. We affirm the judgement of the district court in all respects.

I.

The factual basis for this action began in 1971, when the owners of tracts 1,2, and 6 of the Columbus III oil field, the Koziaraz, assigned overriding royalty interests in the tracts to the law firm of Dietrich & Schrauger. In 1972, the law firm assigned its interest to Helen Spalter, the mother of plaintiff Edgar Dietrich, for life remainder to Katherine Dietrich, Edgar Dietrich's daughter. On June 1, 1984,

Katherine Dietrich reassigned her interest to plaintiffs.

Plaintiffs brought this action in Michigan state court in 1987, alleging that the defendant oil company had illegally drained oil from the field, had failed to compensate them for oil drained from the field, and had in other ways improperly managed the field. The defendants removed the case to federal court on diversity grounds, and plaintiff subsequently filed an amended complaint alleging the following:

> **Count I:** Defendants illegally drained 36,417.5 barrels of oil from the oil field in which the plaintiffs held an interest during the period from November 1, 1971 to June 30, 1974;
>
> **Count II:** Defendants illegally overproduced oil from the field in addition to that alleged in Count I, in breach of their fiduciary duty to the plaintiffs;
>
> **Count III:** Defendants negligently or intentionally breached their duty to plaintiff by failing to use the care and skill of an ordinary oil producer, including under-reporting oil reserves, sabotaging wells, and persuading witnesses to give false testimony at earlier administrative proceedings;
>
> **Count IV:** Defendants fraudulently induced plaintiffs or their predecessors to sign a unitization agreement in 1974.
>
> **Count V:** Defendants failed to compensate plaintiffs for 881,071 barrels of oil allegedly produced by defendants from November, 1984 to march, 1985.

Pursuant to defendants' first motion for summary judgment, the district court disposed of Count **II** in favor of the defendants. Plaintiff do not contest that disposition here and consequently we do not address it. Defendants filed a subsequent motion for summary judgment, which the district court granted on Counts **I, III and IV.** *See Dietrich v. Sun Exploration and Production Co.,* 784 F. Supp. 383 (E.D. Mich. 1992). Plaintiffs pursued Count V until the day of trial, July 2, 1992, at which point they admitted that they were unable to factually substantiate the claim. The district court granted judgment as a matter of law in favor of the defendants on the count, and dismissed the entire action. Plaintiff appeal the summary judgment disposition of Counts **I, III and IV,** which we address in Part **II** of this opinion. Plaintiff also appeal the district court's judgment as a matter of law on Count V, which we take up in Part **III** of this opinion.

The district court also imposed two monetary sanctions against the plaintiff during this litigation. in

1991, after the cause of action had been pending and discovery underway for almost four years, the district court assessed against the plaintiffs approximately $13,000 in reasonable costs and fees for abusive litigation practices. After dismissing the entire action in July of 1992, the court also imposed sanctions under Rule 11 for plaintiff' pursuit of Count V, a factually unsubstantiated claim. Plaintiff appeal both assessments, which we address in Part IV of this opinion.

II.

The district court disposed of Counts I, III and IV on summary judgment in favor of defendants. We review summary judgments *de novo*, applying the same standard as that applied by the district court. The record must demonstrate that no genuine issue of material fact remains, reviewing the record and evidence in the light most favorable to the non-moving party. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby,* 477 U.S. 242,249 (1986); *Celotax Corp. v. Catrett,* 477 U.S. 317,325 (1986); *Niecko v. Emro Marketing Co.*, 973 F.2d 1296 (6th Cir. 1992).

A.

Plaintiffs allege in Count I that the defendants failed to compensate them for over 36,000 barrels of oil that defendants illegally drained from tracts 1,2 and 6 of the Columbus III oil field between November 1, 1971 and June 30, 1974. Plaintiff argue that the Michigan Court of Appeals decision in *Wronski v. Sun Oil Co.*, 89 Mich. App. 11 (1979)(*"Wronski I"*), can be used offensively to collaterally estop the defendants from contesting the claim.

Wronski I began in April, 1975, when two parties with interests in the Columbus III filed (the Koziaras the Wronskis) filed an actio in Michigan state court, alleging that Sun Oil was overproducing the Columbus III field and converting oil in which they had an interest. They requested recision of their leases with Sun Oil, or in the alternative, sought damages for the over-production on their property. As part of its decision in favor of the plaintiffs in the

case, the trial court found that Sun Oil had drained illegally 50,000 barrels of oil from the Columbus III field during the time period of February 1, 1970 to June 30, 1974. The Michigan Court of Appeals affirmed the findings and judgment for the plaintiff. *Wronski vs. Sun Oil Co.*, 89 Mich. App. 11 (1979).

The district court found that *Wronski I* conclusively established that the defendants drained illegally 50,000 barrels of oil from the field during the period of February 1, 1970 to June 30, 1974. Plaintiff, however, held their interest in the property only form November 1, 1971 to June 30, 1974, creating time and property interest discrepancies between the two cases. Consequently, the district court found that plaintiffs would be required to present proof in addition to the *Wronski I* opinion to establish whether any of (or what percentage of) the illegal drainage established by *Wronski I* had occurred during February 1, 1970 to June 30, 1974. Because the plaintiff admitted that they had no additional evidence to substantiate the claim, the district court granted summary judgment in favor of defendants. *Dietrich v.*

Sun Exploration and Production Co., 784 F. Supp. 383, 387 (E.D. Mich. 1992).

Under Michigan's law of collateral estoppel, if mutuality exists between the parties, a judgment is conclusive in subsequent litigation only "as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action." *Howell v. Vito's Trucking and Excavating Co.*, 386 Mich. 37, 42 (1971)(quoting Restatement of the Law, Judgments, § 68 at 293-94); *Knoblauch v. Kenyon,* 163 Mich. App. 712,719-20 (1987). Assuming *arguendo* that mutuality exists, the district court was correct that plaintiffs cannot establish Count I solely through the use of offensive collateral estoppel. *Wronski I* is conclusive on the finding of the illegal drainage occurring between February 1, 1970 and June 30, 1974; but the parties did not litigate, and

the judgment does not establish, the amount of oil drained illegally during November 1, 1971 and June 30, 1974. *Wronski I* also does not establish that a steady stream was pumped from the field, the percentage pumped during any subperiod of time within the relevant time frame, or the value of oil drained during any subperiod. Thus, *Wronski I* cannot be used as the plaintiffs' only evidence of the amount of oil drained from the property between November 1, 1971 and June 30, 1974.

Plaintiff have failed to respond to the problem of lack of identity of issues actually litigated, continuing to argue on appeal that no additional evidence is necessary. Without such additional evidence, plainiffs cannot prove Count I. Consequently, judgment in favor of the defendants on Count I is proper.

B.

Count III alleges that defendant breached their duty of care as reasonable and prudent oil producer as required under Michigan law. *Michigan-Wisconsin Pipeline Co. v. Michigan National Bank,* 118 Mich. App. 74 1984). The defendants argued and the district

court found that plaintiff was collaterally estopped from litigating this claim by a series of Michigan state administrative and judicial decisions involving the same parties as *Wronski I.* The decisions stem from another lawsuit filed by the plaintiffs in *Wronski I*, the Koziaras and the Wronskis.

In 1975, the Wronski and the Koziaras filed this second lawsuit against Sun Oil, seeking review of a unitization order of the oil field. Orders were entered by the Supervisor of Wells approving the unitization plan for Sun Oil, allowing Sun Oil to manage the Columbus III field. After the state trial court denied a petition for review by the plaintiffs, the Michigan Court of Appeals remanded to an ALJ for a more detailed hearing and decision. *Wronski v. Sun Oil Co.*, 108 Mich. App. 178 (1981)("*Wronski II*). Administrative Law Judge William Fulkerson issued a Proposal for Decision on may 25, 1988 in favor of Sun Oil which was affirmed by the Supervisor of

Wells and the Michigan state courts. *Koziara v. Sun Oil Co.*, (Mich. Dep't. Nat. Resources may 25, 1988)(Fulkerson, ALJ)("Fulkerson Proposal") *aff'd by* Order of the Supervisor of Wells, *Koziara v. Sun Oil Co.*, No. (A) 1-5-73 REMAND (Mich. Dep't Nat. Resources March 22, 1989)("Order of the Supervisor"), *aff'd sub nom. Wronski v. Sun Exploration and Prod. Co.*, No. 79-22915-AA (Ingham Cir. Ct. June 12, 1991)(Stell, J.)

Count **III** specifically alleges that the defendants incorrectly interpreted geological and reservoir data, failed to represent plaintiffs' interests adequately before the michigan Department of Natural Resources at the 1974 unitization hearings, under-reported oil and gas reserves, sabotaged a well ("the 6-3 well") with cement, and persuaded geologists and other witnesses to give false testimony at the unitization hearing. On summary judgment, plaintiffs offered the affidavit and report of Dr. Joshi, a petroleum engineer, who concluded after reviewing all of the data surrounding the unitization process, that defendants' actions "can in no way be stated to [be] at a level of a prudent

operator." (J.A. at 65). Plaintiffs argue that Dr. Joshi's report and opinions create genuine issues of material fact which make summary judgment improper.

The district court found that plaintiff were collaterally estopped by the Fulkerson Proposal, the Order of the Supervisor and *Wronski II* from raising these claims. The court found that these decisions, primarily the Fulkerson Proposal, addressed all claims raised by plaintiffs in Count **III**, thereby collaterally estopping plaintiffs from relitigating them in the instant case. *Dietrich,* 784 F. Supp. at 388-89.

Defensive collateral estoppel applies to administrative determinations where a method of appeal is provided and the decision is final in the absence of an appeal. *Nummer v. Dep't. of Treasury,* 200 Mich. App. 695, 698 (1993). In this case, the Fulkerson Proposal comports with these procedural requirements: a method of appeal was provided through the Supervisor of Wells and the Michigan courts. Such appeal was taken, and the ALF's decision was affirmed by the state courts. The

Fulkerson Proposal is therefore preclusive as long as the other requirements of collateral estoppel are met.

As explained above in Part II.A. of this opinion, collateral estoppel may only be asserted if mutuality between the parties is established. Mutuality involves a determination of whether the litigants were parties or privy to a party in the former action. Sun Oil and its predecessors were parties to the administrative proceedings and *Wronski II*, but the plaintiff, the Dietrichs, were not. However, the Dietrichs were given notice of and the opportunity to formally participate in the administrative proceedings, attended all of the hearings (Edgar Dietrich was a lawyer for the plaintiffs), and actually participated through Dietrich in the hearings. The Dietrichs' interests were identical to the interests of the named plaintiffs, and the Dietrichs had ample opportunity through Edgar Dietrich's participation to assert and protect those interests. Although mutuality may not be strictly

fulfilled here, Michigan allows a more liberal use of defensive estopped in cases such as this, where the standards under which the litigation will take place are identical and where the parties have had their interests heard and protected in the first litigation. *See, e.g., Alterman v. Provizer,* 195 Mich., App. 422, 425 (1992). We therefore, find that the Fulkerson Proposal is preclusive in this action.

We agree with the district court that the Fulkerson Proposal addressed and decided all of the claims made by the plaintiffs in Count III. First, plaintiffs assert that the defendants misinterpreted geological and reservoir date during the unitization process. The Fulkerson Proposal found to the contrary. It found the gas/oil ratio tests reliable, the production figures proper, the use of porosity acre feet determinations proper; the core analysis a proper method to determine porosity feet; the gas/oil contact and average porosity determinations accurate; and the net oil pay column reasonable. (Fulkerson Proposal at 7-16). Second, plaintiffs assert that defendants failed to represent their interests adequately at the 1974

unitization proceedings. The Proposal found that Sun Oil reasonably construed the data and fairly and equitably determined the participation factors and formulas, the primary issue at the unitization hearings. The Proposal also found that Sun Oil had acted in a completely professional manner throughout the hearings. (Proposal at 21-23A). Third, plaintiffs assert that Sun Oil under-reported oil and gas reserves. To the contrary, the Proposal found that a fair and equitable representation of the oil and gas reserves had been provided by Sun Oil. (Proposal at 20). Fourth, plaintiffs assert that Sun Oil had sabotaged wells with cement. The Proposal found that the wells had not been sabotaged with cement, but rather had been treated with standard materials used in "lost circulation zones." The ALJ found that the scientific data indicated that the materials could not have been cement, and that plaintiff assertion was not credible, given Sun Oil's interest in the wells. Fifth, plaintiffs assert that defendants withheld information on a well (the "6-3 well"). Again, the Fulkerson Proposal states that "Every aspect of the 6-3 well was examined in

great detail". It also notes that plaintiffs seem to be asserting that the information was withheld during the unitization process, yet the 6-3 well did not even exist at the time of unitization. (Proposal at 11). Finally, plaintiffs assert that defendants convinced expert witnesses adverse to the plaintiffs to lie at the unitization hearings. The ALJ disagreed, finding that the defendant approached the unitization process in a totally professional manner. (Proposal at 23A).

Given that all aspects of Count **III** were carefully addressed and conclusively determined by the Fulkerson Proposal, plaintiffs are collaterally estopped from litigating the claims in Count **III**, and summary judgment in favor of the defendants is proper.

C.

In Count IV, plaintiffs allege that defendants' misrepresentation of geological and reservoir data to the Michigan Department of Natural Resources induced plaintiffs and/or their predecessors to sign the 1974 unitization plan, thereby denying them their fair share of the unitization production. In effect, plaintiffs rely on statements and conclusions in Dr. Joshi's

affidavit to create material issues of fact. The district court found this claim collaterally estopped by the Fulkerson Proposal and granted summary judgment. *Dietrich,* 784 F. Supp. at 389.

As in Count III, plaintiffs are collaterally estopped by the Fulkerson Proposal. The ALJ resolved in favor of the defendants all contentions regarding the fairness and validity of the unitization proceeding and defendant's involvement in the process. Therefore, whether or not Dr. Joshi agreed with the ALJ's conclusions, plaintiffs cannot challenge them in this proceeding. Summary judgment in favor of the defendants on Count IV is proper.

III.

After the district court disposed of the first four counts on summary judgement, Count V remained to be tried. Count V alleges that between November, 1984 and March, 1985, defendants produced an additional 881,071 barrels of oil from the field that had not been reported previously, and plaintiffs and other owners were not paid royalties on this oil In April, 1992, the court set the trial date for July 2,

1992, and issued the Final Pretrial Order. The Order, drafted and approved by the plaintiffs, directed that all motions in limine be filed at least one week prior to trial. The Order also clarified the issue of fact to the litigated: "Did Defendants remove oil from the Columbus III field *between November, 1984 and March, 1985,* which was not properly accounted for?"

On July 1, 1992, the day before trial, plaintiffs filed two motions in limine. Both were denied as untimely and on the merits by the court. The next day, the first day of trial, plaintiffs conceded that without successful motions in limine, they were unable to factually prove Count V. On that basis, the district court granted defendants' motion for judgment as a matter of law on Count V and dismissed the case. Plaintiffs argue on appeal that the district court erred in denying their two motions in limine, and that judgment on Count V is premised on these erroneous rulings. In Parts A and B below, we address the court's decisions on the motions, and in Part C we address the district court's judgment as a matter of low on Count V.

A.

The first of plaintiffs' motions was a request to clarify or amend the Final Pretrial Order ("the Order") to allow proof regarding production of oil by defendants outside of time period specified in Count V and in the Order. Specifically, plaintiffs requested that they be allowed to admit proof going back to the mid-1970's, although the complaint alleged over-production only between November, 1984 and march, 1985. The district court denied this motion as untimely since it was not filed within the time limits set by the Order. On the merits, the court found that plaintiffs could only have intended this motion as a surprise or delay tactic. The action had been pending for nearly five and one-half years, and the court found it entirely unreasonable to expect the defendants to defend what would essentially be a new claim raised on the day before trial. On appeal, plaintiffs argue that justice required the court to amend or clarify the Order.

We disagree with the plaintiffs and affirm the district court. First, the motion was untimely,

especially in light of the extreme nature of the request. Second, the plaintiffs agreed to and signed the Order; thus, there is no basis upon which to argue at trial that it was not clear, that it required amendment, that it trapped them into a situation of being unable to prove their claim, or that the plaintiffs in good faith court have believed they would freely be allowed to amended the Order. The district court did not abuse its discretion in refusing to allow the plaintiff to raise an essentially new claim one day before trial. We affirm the denial of this motion in limine.

B.

The second motion requested introduction of the *Wronski I* court of appeals and trial court opinions for purposes on impeachment and absence of mistake. Plaintiffs argued that the decisions established that the defendants had illegally drained oil in the early 1970's, and therefore would show that they knew they were against illegally producing oil during the time period in question. The district court denied the motion as untimely. It also addressed the merits of the motion, ruling that in effect this was a motion for

reconsideration because it had already limited the use of *Wronski I* to issues not involved in Count V. *See Dietrich v. Sun Exploration and Prod. Co., 784 F. Supp. 383* (E.D. Mich. 1992). Finally, the court found that the *Wronski I* decisions factually were limited to the issued not relevant to Count V. On those bases, the district court denied the motion in limine. On appeal, plaintiffs argue that this ruling was error.

We agree with the district court's denial of this motion. First, the motion is untimely. It would be unreasonable to expect the defendants to defend the claim with only a one-day notice of the change in expected proof after relying on the court's previous rulings to prepare for trial. Second, the district court ruled on this issue in *Dietrich*, 784 F. Supp. at 387, stating that the use of *Wronski I* was strictly limited to the time and property interest question at issue in Count I. Finally, the time frames involved in *Wronski I* and Count V are completely different, and based on the first motion discussed above, the court had determined that the proof would be strictly limited to

the time period at issue in Count V. In sum, we do not believe that it was an abuse of the court's discretion to limit the proof in this regard and therefore affirm the district court's denial of this motion in limine.

C.

Upon the district court's denial of plaintiffs' motion to clarify or amend the pretrial order, plaintiffs requested an adjournment, admitting that they were unprepared to try the case without the granting of the motion. When the district court denied the motion to adjourn, plaintiffs admitted they were unable to factually substantiate Count V. On that basis, the district court granted defendants' motion for judgment as a matter of law.

Plaintiffs' admission of being unable to prove the claim together with the correct rulings of the district court on plaintiffs' last-minute motions in

limine wholly support the district court's judgment. We therefore affirm the judgment as a matter of law in favor of defendants on Count V.

IV.

The district court imposed two sanctions against plaintiffs during this litigation. In 1991, prior to the disposition of the first four county on summary judgment, the district court imposed approximately $13,000 in sanctions for abusive litigation practices. The second sanction, imposed under Rule 11 against the plaintiffs and plaintiffs' counsel, was ordered by the court after the entire case was dismissed for pursuit of a factually unsubstantiated claim (Count V). Plaintiffs appeal both sanctions, and we address them below.

A.

After the filing of this lawsuit in 1987, discovery proceeded over the next two years. In 1989, defendants filed a motion to dismiss under Fed.R.Civ.P. 37 for failure to comply with discovery, under Rule 16 for failure to comply with a court order and under Rule 41 for failure to prosecute.

Defendants also requested costs and reasonable attorneys fees. The court referred the motion to a Magistrate, who held two hearings on the matter and issue a detailed, comprehensive Report and Recommendation ("R&R")(J.A. at 146). The district court accepted the R&R, which recommended the imposition of monetary sanctions short of dismissal for abusive litigation practices. Specifically, the court ordered that the plaintiffs pay $12,973.35 for reasonable attorney fees and other reasonable expenses incurred by defendants as a result of plaintiffs' neglect and misconduct during discovery.

On appeal, plaintiffs contend that the district court erred in accepting the R&R because the court's reasons for imposing the sanctions were beyond their control. Plaintiffs also argue that the district court had no authority to impose these sanctions. As explained below, the sanctions imposed were well within the authority and reasonable discretion of the district court and enjoy ample support in the record.

Rules 37(b)(2) and 37(d) of the Federal Rules of Civil Procedure provide authority to the district courts

to impose sanctions, including monetary sanctions, for unjustified noncompliance with discovery orders or rules. These orders need not be in writing to be the basis for discovery sanctions. *See, e.g., Penthouse Int's Lts.a v. Playboy Enterprise Inc.*, 663 F.2d 371, 386-88 (2d Cir. 1981). The court also has broad, well-recognized inherent authority to protect the administration of trails by levying sanctions in response to abusive litigation practices. *Id.* at 386 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)); *see also Link v. Wabach R.R. Co.*, 370 U.S. 626 (1962). Consequently, the district court in the instant case clearly had the authority to impose these sanctions.

The record also supports the decision to impose sanctions. The R&R detailed plaintiffs' repeated failures t comply with discovery orders of the court, failures to answer interrogatories, repeated requests for extensions for responding to discovery requests, failure to appear at scheduled court conferences, failure to produce their expert witness for a deposition by the deadline set by the court, and at least two requests that

the trial date by changed (the action had been set for trial 13 times). In fact, in a later order of the district court on another sanction issue, the court described plaintiffs' conduct as "inordinate and unjustifiable interferences with and obstruction of the exercise of [defendants'] discovery rights." (J.A. at 367-68). These examples illustrate the extreme and ongoing nature of abuses by plaintiffs, and support the court's decision to impose sanctions. We find no error in the imposition of sanctions for abuse of discovery, and therefore affirm.

B.

On August 7, 1992, one month after the district court dismissed the case, defendants filed a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, alleging that plaintiffs pursued Count V will full knowledge that they were unable to prove the claim. After entertaining plaintiffs' response to the motion, the court imposed Rule 11 sanctions on the grounds that the plaintiff had pursued a factually unsubstantiated claim. The court ordered the defendants to supply affidavits outline reasonable costs

and fees incurred as a result of plaintiffs' misconduct. On February 26, 1993, upon review of the materials submitted and review of plaintiffs' objection, the court ordered that "plaintiffs and plaintiffs' counsel shall pay to defendants in equal share the sum of $19,735.00...."

Plaintiffs argue on appeal that the court cannot impose Rule 11 sanctions when the complaint was originally filed in state court and later removed to federal court. This argument is without merit. In *Mann v. G&G Mfg. Inc.*, 900 F.2d 953 (6th Cir.), cert. denied sub nom., Sloan v. G&G Mfg. Inc., 498 U.S. 959 (1900), the court held that after a complaint is filed, attorneys have a "continuing responsibility to review their pleadings, and if necessary, to modify them to conform with Rule 11". Id. at 959. "Failure to do so permits the district court, within its discretion, to impose sanctions against the offending litigant or attorney when a reasonable inquiry would have disclosed that the complaint was either lacking in factual support or unwarranted by existing law." Id. (citing *Herron vs. Jupiter Transportation Co.*, 858

F.2d 332, 336 (6th Cir. 1988)). Plaintiffs filed an emended complaint in federal court, and were under the continuing responsibility explained in *Mann* to review and modify their pleadings in accordance with Rule 11.

Plaintiffs next argue that the district court abused its discretion when it found plaintiffs' actions objectively unreasonable and deserving of Rule 11 sanctions. They argue that only a technical defect in Count V prohibited them from prosecuting the claim, and that they objectively and in good faith believed that they would be allowed to amend the pleading on the day before trial. Plaintiffs produce no evidence that they did not know of or should not have been required to discover the problem in the complaint sooner. In fact, the record clearly reflects that they did know of the time discrepancies during the final

pretrial conference three months before trial. At the conference, the court refused to allow plaintiffs to alter the substance of Count V, specifically stating in the Final Pretrial Order that the dates would be restricted to those in the complaint. As such, this was not a "technical defect" of which plaintiffs were unaware. Plaintiffs have established absolutely no abuse of discretion on the part of the district court in imposing these sanctions. In fact, the record reflects that this is exactly the type of case for which Rule 11 sanctions are appropriate.

The court assessed $19,735 in Rule 11 sanctions based on plaintiffs conduct from February, 1992 (when all counts except Count V were dismissed) until July 2, 1992 (the day of trial). Plaintiffs argue on appeal that the amount of sanctions should be based only on the costs incurred immediately before trial or just for the first day of trial.

The district court found that Count V was factually unsubstantiated and that plaintiffs had pursued the claim despite knowledge of this problem. Thus,a defendants incurred unnecessary costs and fees starting

in February, 1992, when they were preparing solely for trial on Count V. Further, the court inquired extensively into the basis and reasonableness of any sanctions, twice striking the affidavits of defendants and ordering to submit more specific statements of their incurred costs.a The court allowed plaintiffs ample opportunity to file objections to al submissions by the defendants. In sum, the record amply supports the district court's decision; it did not abuse its discretion in setting the amount of sanctions.

The Rule 11 sanctions were entered against plaintiffs and plaintiffs' counsel in equal amounts. Plaintiffs' counsel argues that the district court erred in imposing sanctions against him because the defendants did not request such a sanction and he did not have notice to oppose the sanctions against himself. Defendants assert on appeal that we are without jurisdiction to review counsel's argument because counsel was not named in the notice of appeal as a party intending to appeal.

The notice of appeal states: "Notice is hereby given that, EDGAR J. DIETRICH and THERESITA

DIETRICH, Plaintiffs, in the above entitled matter hereby appeal...." The caption refers only to the plaintiffs; nowhere does it refer to counsel as a plaintiff in the case or on appeal. Failure to name a party in the notice of appeal, as required by F.R.A.P. 3(c), "constitutes a failure of that party to appeal." *Torres v. Oakland Scavenger co.*, 487 U.S. 312, 314 (1988). The Supreme Court in *Torres* enunciated a strict, unyielding interpretation of Rule 3(c) which stripped the lower courts of discretion to waive technical requirements. Under *Torres*, it is clear that we would not have jurisdiction to review counsel's appeal.

Since *Torres*, Rule 3(c) has been amended to prevent appeals from being destroyed by some technical defects. For example, the Rule states that an appeal should not be dismissed "for failure to name [in the notice] a party whose intent to appeal is otherwise clear from the notice." Thus, when a notice of appeal specifies "all plaintiffs" or "the plaintiffs A,B, et al.," the appeal should not be dismissed since it is objectively clear how the parties are that intend to

appeal. In this case, however, it is not objectively clear that counsel intended to appeal. The notice specifically names only the two plaintiffs, the caption nowhere refers to counsel, and counsel is described below the caption only as "Attorney for Plaintiffs". This notice contains no objective indication, or even an ambiguity, that we may interpret as including plaintiff's counsel. Under Rule 3(c) and Torres, we are without jurisdiction to entertain this portion of the appeal. *See also F.T.C. v. Amy Travel Services, Inc.*, 875 F.2d 564 (7th Cir.), *cert. denied, 493 U.S. 954 (1989).*

V.

In sum, summary judgment in favor of the defendants is proper on Counts ***I,III and IV.*** *The district court also correctly granted judgment as a matter of law in favor of the defendants on Count* ***V.*** *Finally, we find no error in the court's imposition of sanctions for abusive litigation practices and under Rule 11. The district court's judgment is* ***AFFIRMED*** *in all respects.*of

UNITED STATES DISTRICT COURT R.2
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

Case No. 87-70451
Hon. Paul V. Gadola
Entered Feb. 26, 1993

ORDER DIRECTING PLAINTIFFS TO PAY SANTIONS TO DEFENDANTS

On August 28, 1992, this court entered an order granting defendants' motion for sanctions. On February 4, 1993, defendants submitted detailed documentation, in the form of affidavits, of the costs incurred by defendants in connection with the defense against Count V of this lawsuit. On February 17, 1993, plaintiffs filed objections to defendants' affidavits.

The court, having reviewed defendants' affidavits

and plaintiffs' objections thereto, finds that defendants incurred costs totalling $19,735.00; that is, $14,134.50 in legal fees and $831.85 in costs in connection with the legal representation of outside-counsel, Terence Lynum, and $4,768.65 in in-house counsel and personnel costs.

ORDER

Therefore, it is hereby ORDERED that plaintiffs and plaintiffs' counsel shall pay to defendants in equal share the sum of $19,735.00 by no later than thirty (30) days from the date of this order.

SO ORDERED.

Dated: 2/26/93

PAUL V. GADOLA
United State District Judge

UNITED STATES DISTRICT COURT **R.3**
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

Case No. 87-70451
Hon. Paul V. Gadola
Entered Aug. 28, 1993

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

On July 8, 1992, this court entered an order dismissing the last remaining claim contained in the amended complaint. This order was based on plaintiffs' counsel's admission that plaintiffs would be unable to present proofs essential to their case. On August 7, 1992, defendants filed the instant motion for sanctions pursuant to Fed. R. Civ. P. 11. Plaintiffs filed a

response August 24, 1992. Oral argument was dispensed with pursuant to LR 7.1(e)(2) (E.D. Mich. Jan. 1, 1992).

BACKGROUND FACTS AND PROCEDURE

Plaintiffs filed their original complaint in this matter in Wayne County Circuit Court. The matter was removed to federal court February 9, 1987. An amended complaint was filed April 11, 1988. In their five-count, amended complaint, plaintiffs alleged that defendants illegally drained 36.417.5 barrels of oil from land in which they had an interest (Count I); that defendants illegally overproduced oil from the land, thereby breaching an alleged fiduciary duty owed to plaintiffs (Count II); that defendants negligently or intentionally breached their duty to plaintiffs by failing to use the care and skill of an ordinary and prudent oil producer, including underreporting oil reserves, sabotaging the well by pouring cement into it and persuading geologists and other witnesses to give false testimony (Count III); that defendants fraudulently induced plaintiffs or their

predecessors to sign the unitization agreement (Count IV); and that defendants failed to compensate plaintiffs for 881.071 barrels of oil allegedly produced by defendants (Count V).

In his November 1, 1988 order, United States District Judge Patrick J. Duggan dismissed Count II of the amended complaint. By a January 10, 1989 administrative order, this case was reassigned to this court. Subsequently, this court granted defendants summary judgment as to Counts I, II and IV February 10, 1992. Thus, the only claim remaining in the case was count V.

The history of this case would not be complete without an overview of the extreme litigiousness and delay that has occurred because of the actions of plaintiffs and plaintiffs' counsel. Plaintiffs have twice filed motions to extend discovery (March 20, 1989, and May 4, 1989). Plaintiffs have also twice filed motions to change the trial date (July 28, 1989, and November

15, 1989). Further, this court has sanctioned plaintiffs for the actions of their attorney. Plaintiffs' counsel delayed and obstructed discovery of plaintiffs' expert Dr. M.Y. Joshi by purposefully failing to produce Dr. Joshi for his deposition. Plaintiffs' counsel also delayed his responses to defendants' interrogatories. Further, plaintiffs' counsel has given defendants and this court assurances that future discovery matters would be complied within a timely fashion. These assurances were not fulfilled.

Defendants, after inordinate and unjustifiable interferences with and obstruction of the exercise of their discovery rights, eventually filed a motion to dismiss on the basis of such obstructions and procrastination. Magistrate Judge Steven D. Pepe, in his report and recommendation of May 24, 1991, declined to recommend the extreme and ultimate relief of dismissal of plaintiffs' case, but did recommend that plaintiffs pay sanctions to defendants in the amount of $12,9073.35.

The report and recommendation is replete with detailed presentations of the conduct which led to the recommendation of such a substantial sanction.

On August 1, 1991, this court accepted the magistrate judge's report and recommendation that plaintiffs be sanctioned in the amount of $12,9073.35, reflecting defendants' attorneyhs' and experts' fees expended due to plaintiffs' counsel's delays. This amount was to be paid no later than September 1, 1991. Failure to pay in a timely fashion would result in at least plaintiffs' inability to use Dr. Joshi as an expert. Further, failure to timely pay this amount might also have resulted in dismissal of plaintiffs' claims. Plaintiffs failed to pay this amount by September 1, 1991. Nevertheless, at the request of plaintiffs' counsel, this court again showed leniency and ordered that time for payment of the sanctions be extended and that payment be made not later than May 1, 1992.

This matter has been set for trial thirteen times.

Judge Duggan had set trial for March 1988, July 1988, November 1988, and March 1989. This court has set trial dates of June 1989, September 1989, December 1989, March 1991, May 1991, February 1992, March 1992, April 1992, and July 1992. Further, plaintiffs have three times asked for an extension of time to file the joint final pretrial statement (motions dated July 28, 1989; November 15, 1989; and April 6, 1992). The latest motion filed was due to plaintiffs' counsel being on vacation the two weeks prior to the due date. This court takes notice, however, that plaintiffs' counsel was given ample notice of the pending trial date and the due date of the final pretrial statement. Additionally, it was not until after the final pretrial statement was due that plaintiffs' counsel decided to file a motion to extend the time for filing.

Finally, this matter was set for trial July 2, 1992, on the sole remaining issue of whether defendants produced 881.071 barrels of oil from the Columbus III

oil field without compensating plaintiffs (Count V). On July 1, 1992, plaintiffs filed two "motions in limine." (1.fn) The first motion was entitled "Motion in Limine to Clarify and/or Amend Final Pretrial Order." and the second motion was entitled "Motion in Limine Regarding Introduction of the Wronski and Streeter Opinions for the Limited Purpose of Impeachment and Absence of Mistake." In its July 8, 1992 order, this court denied plaintiffs' motions in limine because both were untimely filed. Further, this court stated that, as to plaintiffs' first motion, plaintiffs could not alter the final pretrial order, signed by all parties' counsel and issued by this court, at such a late date. Finally, as to plaintiffs' second motion, the issue had already been decided; and the opinions sought to be introduced were not germane or relevant to the remaining issues.

(1.fn) Technically, these motions, although entitled motions in limine, were motions to expend the proofs rather than limit the proofs. These motions were essentially a motion for reconsideration and a motion to

amend the pretrial order.

Additionally, after this court informed the parties of its preliminary decision concerning plaintiffs' two motions in limine, plaintiffs formally moved this court to adjourn trial because plaintiffs' counsel was unprepared to offer proofs that the 881.071 barrels of oil at issue were produced between November 1984 and March 1985. Trial in this matter had been set for July. Counsel had been on notice of this trial term since April 1992. Trial briefs had been filed, a jury had been chosen, and the court's trial docket had been cleared so that the parties in this case could finally resolve their dispute. Because plaintiffs' request for an adjournment on the first day of trial based upon matters that should have been resolved months if not years prior was patently unfair not only to this court and to the jurors selected, but also to opposing counsel, this court denied plaintiffs' motion to adjourn.

Finally, defendants formally moved this court for

a judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P 56(b). Defendants point to plaintiffs' admission that they could not prove that the 881.071 barrels of oil in dispute were produced between November 1984 and March 1985, a crucial and necessary part of plaintiffs' claim. Plaintiffs did not dispute that, at that point in the trial, they could not prove those necessary elements of their claim; and they informed the court that they could present no proof whatsoever to establish that defendants produced any oil between November 1984 and March 1985 for which plaintiffs were not compensated. Because of plaintiffs' admission, this court granted defendants' motion for judgment as a matter of law or, in the alternative, for summary judgment.

ANALYSIS

Plaintiffs first assert that, because they have filed a notice of appeal, this court is without jurisdiction to hear defendants' motion for sanctions. This contention is without merit. "(A) district court retains jurisdiction to entertain a motion for Rule 11 sanctions even after the filing of a notice of appeal." Val-Land Farms, Inc. v. Third Nat'l Bank in Knoxville, 937 F.2d 1110, 1117 (6th Cir. 1991) (citing Regional Refuse Sys. v Inland Reclamation Co., 842 F.2d 150, 156 (6th Cir. 1988)). Therefore, this court will decide the instant motion.

Second, plaintiffs suggest that Rule 11 does not apply to the instant case because at the time the amended complaint was filed, plaintiffs believed they had a viable claim. However, this court reads Rule 11 to create a continuing obligation on the part of counsel to reassess each pleading, motion or paper filed with this court in light of failed or successful discovery.(2.fn) Once plaintiffs' counsel realized that he could not prove his

claim as stated in the amended complaint and the pre-trial statement, counsel should have dismissed his clients' claim. Because he did not do so, plaintiffs' counsel shall be sanctioned for pursuing a factually unsubstantiated claim. See Lawrence v. Hinton, 937 F.2d 603 (4th Cir. 1991) (unpublished disosition); Propst v. Greene, 123 F.R.D. 535, 542-43 (W.D.N.C. 1988).

Third, plaintiffs argue that this court cannot impose sanctions because it is relying upon facts which plaintiffs believe are in error. However, this argument _____

(2.fn) The United States Court of Appeals for the Sixth Circuit has ruled on this issue several times. However, the panels of the Sixth Circuit have reached varying and oftern contrary results. Compare Roy v. United States Fidelity & Guar. Co., 922 F2d 841 (6th Cir. 1991) (unpublished decision) (no continuing obligation imposed by Rule 11), and Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989) (same) with Mann v. G & G Mfg., 900 F.2d 953, 959 (6th Cir. 1990) (continuing obligation imposed by Rule 11), cert. denied sub nom.. Sloan v G & G Mfg., 111 S. Ct. 387 (1990), and Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988) (same). See also Cincinnati Newspaper Pressmen Union No. 30N v. Gannett Satellite Info. Network, Inc., 737 F. Supp. 473, 476 (s.D. Ohio 1990) (continuing

obligation imposed by Rule 11); Yancey v. Carroll County, Ky., 674 F. Supp. 572, 577 (E.D. Ky, 1987) (same), aff'd, 884 F.2d 581 (6th Cir. 1989); Advo Sys. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986) (same). Because the latest published opinion from the Sixth Circuit has stated that Rule 11 imposed upon attorneys a continuing obligation to reassess their pleadings, Mann, 900 F.2d at 959, this court will thus impose such a duty upon plaintiffs' counsel.

is an attempt to appeal this court's findings of fact and conclusions of law. That task is better left to the court of appeals.

Finally, this court shall not limit sanctions to those possible under Rule 11 but shall also impose costs and fees pursuant to this court's inherent power to sanction for bad-faith conduct. See Chambers v. Nasco, Inc., 501 U.S. ----. 115 L.Ed.2d 27, 47-48 (1991).

ORDER

Therefore, it is hereby ORDERED that defenants' motion to impose sanctions is GRANTED and that reasonable costs and attorneys' fees shall be imposed equally upon plaintiffs and plaintiffs' counsel.

It is further ORDERED that defendants supply the

court with an affidavit outlining all reasonable costs and attorneys' fees generated by plaintiffs counsel's failure to withdraw Count V.

SO ORDERED.

Dated: 8/28/92

PAUL V. GADOLA
United States District Judge

R.4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH.

Plaintiffs, CASE NO.: 87-70451
HONORABLE PAUL V. GADOLA

VS.

ENTERED: JULY 8, 1992

SUN EXPLORATION AND PRODUCTION
COMPANY and SUN OPERATING LIMITED
PARTNERSHIP.

Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFFS' MOTIONS IN LIMI

DENYING PLAINTIFFS' MOTION TO ADJOURN, AND GRANTIN

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LA

Plaintiffs filed their original complaint in this matter in Wayne county Circuit Court. The matter was removed to federal court February 9, 1987. An amended complaint was filed April 11, 1988. In their five-count amended complaint, plaintiffs alleged that defendants illegally drained 36, 417.5 barrels of oil from land in which they had an interest (Count I): that defendants

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illegally overpronounced oil from the land, thereby breaching an alleged fiduciary duty owned to plaintiffs (Count II): that defendants negligently or intentionally breached their duty to plaintiffs by failing to use the care and skill or an ordinary and prudent oil producer, including underreporting oil reserves, sabotaging the well by pouring cement into it and persuading geologists and other witnesses to give false testimony (Count III): That defendants fraudulently induced plaintiffs of their predecessors to sign the unitization agreement (Count IV): and that defendants failed to compensate plaintiff for 881,071 barrels of oil allegedly produced by defendants (Count V).

In his November 1, 1988 order, United States District Judge Patrick J. Duggan dismissed Count II of the amended complaint. by a January 10, 1989 administrative order, this case was reassigned to this court. Subsequently, this court granted defendants summary judgment as to County I, III and IV February 10, 1992. The only claim remaining in the case is Count V.

The history of this case would not be complete

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without an overview of the extreme litigiousness and delay that has occurred because of the actions of plaintiffs and plaintiffs counsel. Plaintiffs have twice filed motions to extend discovery (March 20, 1989 and May 4, 1989). Plaintiffs have also twice filed motions to change the trial date (July 28, 1989, and November 15, 1989). Further, this court has sanctioned plaintiffs for the actions of their attorney. Plaintiffs counsel delayed and obstructed discovery of plaintiffs expert Dr. M.Y. Joshi by purposefully failing to produce Dr. Joshi for his deposition. Plaintiffs counsel also delayed his responses to defendants and this court assurances that future discovery matters would be complied with in a timely fashion. These assurances were not fulfilled.

Defendants, after inordinate and unjustifiable interferences with and obstruction of the exercise of their discovery rights, eventually filed a motion to dismiss on the basis of such obstructions and procrastination. Magistrate Judge Steven D. Pepe, in his report and recommendation of May 24, 1991, declined to recommend the extreme and ultimate relief of dismissal of plaintiffs case, but did recommend that plaintiffs pay

sanctions to defendant in the amount of $12,973.35. The report and recommendation is replete with detailed presentations of the conduct which led to the recommendation of such a substantial sanction.

On August 1, 1991, this court accepted the magistrate judge's report and recommendation that plaintiffs be sanctioned int the amount of $12,973.35, reflecting defendants attorneys and experts fees expended due to plaintiffs counsel's delays. This amount was to be paid no later than September 1, 1991. Failure to pay in a timely fashion would result in at least plaintiffs' inability to use Dr. Joshi as an expert. Further, failure to timely pay this amount might also have resulted in dismissal of plaintiffs claims. Plaintiffs failed to pay this amount by September 1, 1991. Nevertheless, at the request of plaintiffs counsel, this court again showed leniency, and ordered that time for payment of the sanctions be extended, and that payment be made not later than May 1, 1992.

This matter has been set for trial thirteen times. Judge Duggan had set trial for March 1988, July 1988, November 1988, and March 1989. This court has set

trial dates of June 1989, September 1989, December 1989, March 1991, May 1991, February 1992, March 1992, April 1992 and July 1992. Further, plaintiffs have three times asked for an extension of time to file the joint final pretrial statement (motions dated July 28, 1989, November 15, 1989, and April 6, 1992). The latest motion filed was due to plaintiffs counsel being on vacation the two weeks prior to the due date. This court takes notice, however, that plaintiffs counsel was given ample notice of the pending trial date and the due date of the final pretrial statement. Additionally, it was not until after the final pretrial statement was due that plaintiffs counsel decided to file a motion to extend the time for filing.

Finally, this matter was set for trial July 2, 1992, on the sole remaining issue of whether defendants produced 881,071 barrels of oil from the Columbus III oil field without compensating plaintiffs (Count V). On July 1, 1992, Plaintiffs filed two "motions in limine".[1] The first motion was entitled "Motion in Limine to

[1] Technically, these motions, although entitled motions in limine, are in reality mot to expand the proofs rather than limit the proofs. These motions are essentially a motion reconsideration and a motion to amend the pretrial order.

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Clarify and/or Amend Final Pretrial Order" and the second motion was entitled "Motion in Limine Regarding Introduction of the Wronski and Streeter Opinions for the Limited Purpose of Impeachment and Absence of Mistake."

Procedurally, as motions in limine, plaintiffs' motions were denied as untimely. On June 14, 1991, this court issued a "notification of final pretrial conference and trial." In this notification, this court ordered that "[a]11 motions in limine shall be filed and served on opposing counsel four weeks before trial." In a later order dated April 14, 1992, this court relaxed the time limits and ordered that "[a]t least one week prior to beginning of trial term all counsel shall furnish to the court... motions in limine." Under both orders, plaintiffs motions were untimely. Prompt and complete review of motions in limine guarantees a more efficient and streamlined trial. Therefore, failure to follow this court's scheduling orders concerning motions in limine is a sufficient ground to deny plaintiffs motions. Further, it is incredible that plaintiffs and plaintiffs counsel waited until the last moment before trial,

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especially when this case has gone through thirteen different trial dates, to file these motions. Plaintiffs motions, filed on July 1, 1992, at 11:56 am, and delivered to this court later that day, with trial scheduled for 8:30 am on July 2, 1992, deserve and warrant denial on the basis of untimeliness alone. However, because of the importance of these motions, this court will address the merits as well.

In their first motion, plaintiffs asked this court to allow the final pretrial order to be clarified and/or amended. Count V of the amended complaint set forth plaintiffs sole remaining claim:

> 45. Plaintiffs...state that in November of 1984 through March of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field that had not previously been accounted for. That said figures were subsequently removed from the production records after an inquiry was made by Eugene Koziara.
>
> 46. ..... Plaintiffs have never been compensated for their aliquot share of the revenue from the sale of this oil under unitization.

Amended compl. at paras. 45 & 46. From this plaintiffs and defendants fashioned the final pretrial order which stated in relevant part:

Plaintiffs allege that in November of 1984 through March

of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field between November, 1984 and March 1985, for which Plaintiffs were not compensated.

* * *

Issues of fact to be litigated..... Did Defendants remove oil from the Columbus III filed between November , 1984 and march, 1985, which was not properly accounted for?

Final pretrial order at 2 & 4.

The final pretrial order drafted and approved by plaintiffs, counsel

did further state as follows:

Plaintiffs intend to file a Motion to Amend their pleadings to allow for testimony regarding Count V dealing with the time period of June 1974 through March 1985 as it relates to Tracts 1 and 2, along with Tract 6, pertaining to unaccounted-for oil that was produced.

Id. at 3 (emphasis added). With their first motion, which is the possible motion to which plaintiffs counsel referred in the final pretrial order, plaintiffs counsel referred in the final pretrial order, plaintiffs wished to amend the final pretrial order to state that the production of oil by defendants, for which plaintiffs claimed they had not been compensated, need not have occurred between November 1984 and March 1985, and instead may have occurred from June 1974 through March 1985.

Defendants vigorously objected to this motion. Defendant stated that they were prepared to defend against plaintiffs claim that "881,071" barrels of oil were produced in the Columbus III field between November, 1984 and march, 1985." Id. at 2. Defendants stated that, on July 2, 1992, they were not prepared to defend against the much broader claim that the oil was produced at any time prior to March 1985.

The court agreed with defendants that altering the final pretrial order, signed by all parties' counsel and issued by this court, at such a late date would be tantamount to a surprise tactic designed to redefine a claim set in place for over five years. The court read Count V of the amended complaint to say that the oil must have been produced between November 1984 and march 1985. However, the court did recognize an ambiguity which is arguable at best. On the other hand, the final pretrial order was clear and distinct: "Did Defendants remove oil from the Columbus III filed between November, 1984 and March, 1985 ....?" Id. at 4. This statement of plaintiffs' claim can be no clearer.

Further, the tactic of plaintiff in filing their motion on the eve of trial to state an entirely different claim than they had been asserting sine the filing of their amended complaint of April 11, 1988, was reprehensible and unacceptable. Viewing this motion against the backdrop of the history of this case, this court can only surmise that it was intended to either be a surprise tactic or at least a delay tactic. Therefore, this court did not allow plaintiffs' amendment on the morning of trial, with a jury having been selected and ready to hear the case, because it would have worked substantial injustice upon defendants who have adequately prepared for trial over the five years this case had been pending, on the basis that they were defending a claim of oil allegedly taken without compensation between November 1984 and March 1985. This would have presented defendants with the prospect of defending against an entirely different claim, with possibly different defenses, including, as defendants counsel correctly pointed out in oral argument on July 2, 1992, the defense of the statute of limitations.

Second, plaintiffs filed a second motion in limine asking this court to allow the introduction of the

"Wronski"[2] and "Streeter"[3] opinions for the limited purpose of impeachment and absence of mistake. On November 16, 1989, plaintiffs filed a "Motion in Limine Regarding Admissability and Effect of 1974 [sic] Opinion of Judge Streeter and Wronski v. Sun Oil, 89 Mich. App 11 (1979) in the Instant Litigation." In Dietrich vs. Sun Exploration and Prod. co., 784 F. Supp. 383 (E.D. Mich 1992), this court clearly utilized both opinion in the decision but limited the Wronski and Streeter opinions to issues not involved in the current trial. This court again clarified this issue in its April 28, 1992 order addressing plaintiffs November 16, 1989 motion. This court read the instant motion in limine as an attempt to file a belated motion for reconsideration, which will not be allowed.

Further, even though plaintiffs attempted to limit their use of the Wronski and Streeter opinions to impeachment and absence of mistake, these opinions, as discussed in Dietrich, were limited to matters not germane to the sole remaining issue set for trial. The parties, transactions, remedies and facts in the Wronski

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[2] Wronski v. Sun Oil Co., 89 Mich. App. 11 (1979), leave denied, 407 Mich. 863 (19

[3] Wronski v. Sun Oil, Nos. 101-7 & 103-7 (St. Clair Cir. Ct. Dec. 21, 1976).

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and Streeter decisions were not the same as in the instant case. Therefore, the court also denied plaintiffs' second motion in limine.

Additionally, after this court informed the parties of its preliminary decision concerning plaintiffs' two motions in limine, plaintiffs formally moved this court to adjourn trial because plaintiffs' counsel was unprepared to offer proofs that the 881,071 barrels of oil at issue were produced between November, 1984 and March, 1985. Trial in this matter had been set for July. Counsel had been on notice of this trial term since April, 1992. Last minute tactical maneuvers to avoid litigation are not looked upon favorably by this court and will not be tolerated. Trial briefs had been filed, a jury had been chosen, and the court's trial docket had been cleared so that the parties in this case could finally resolve their dispute. To ask for an adjournment on the first day of trial based upon matters that could and should have been resolved months if not years prior is patently unfair not only to this court and to the jurors selected, but also to opposing counsel. Therefore, this court denied plaintiffs' motion to adjourn.

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Finally, defendants formally moved this court for a judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(b). Defendants point to plaintiffs' admission that they could not prove that the 881,071 barrels of oil in dispute were produced between November, 1984 and March, 1985, a crucial and necessary part of plaintiffs' claim. Plaintiffs did not dispute that, at this point in the trial, they could not prove these necessary elements of their claim, and informed the court that they could present no proof whatsoever to establish that defendants produced any oil between November 1984 and March 1985 for which plaintiffs were not compensated.

Federal Rule of Civil Procedure 50(a) reads in relevant part:

> If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Plaintiffs were heard to admit, and did again admit, that

they could not prove an essential element of their claim. Defendants moved this court for a judgment as a matter of law. Because of plaintiffs' admission, this court granted defendants' motion for judgment as a matter of law or, in the alternative, for summary judgment.

ORDER

Therefore, it is hereby **ORDERED** that plaintiffs July 1, 1992 motions in limine are **DENIED**.

It is further **ORDERED** that plaintiffs' motion to adjourn trial is **DENIED**.

It is further **ORDERED** that defendants' motion for judgment as a matter of law or, in the alternative, summary judgment, is **GRANTED**.

SO ORDERED.

Dated: July 8, 1992

_____
HON. PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT **R.5**
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

Case No. 87-70451
Hon. Paul V. Gadola
Detroit, Michigan
Thursday, July 2, 1992

JURY TRIAL TRANSCRIPT
(PARTIAL; Pgs. 37-50)

BEFORE THE HONORABLE
PAUL V. GADOLA, FEDERAL JUDGE

TRANSCRIPT ORDERED BY:
JACK CHILINGIRIAN

APPEARANCES:

For the Plaintiff:

By: Jack Chilingirian
P.O. Box 319
St. Clair Shores,
MI 48080

For the Defendants:	Lynam & Associates By: Terence V. Lynam P.O. Box 80705 Lansing, MI 48908
Recorded by:	Elnora Williams 133 U.S. Courthouse Detroit, MI 48226
Transcribed by:	Lynn L. Spietz 13810 Courtland Oak Park, MI 48237

THE COURT: We're prepared to proceed this morning. Is it your representation that you cannot -- that your're unable to present any proofs --

MR. CHILINGIRIAN: As an officer of the court, your Honor, I could not prove November '84 forward; I can prove November '94 backwards, and it's --

THE COURT: You -- you -- you concede then that you have no proofs that the Defendant surreptitiously, or otherwise, removed oil from the Columbus III oil field between November 1984 and March 1985?

MR. CHILINGIRIAN: Correct.

THE COURT: Is that correct?

MR. CHILINGIRIAN: That's correct, that's correct.

THE COURT: sO YOU HAVE NO PROOF AVAILABLE TO SUBSTANTIATE YOUR CLAIM?

MR. CHILINGIRIAN: That -- well -- I'm sorry, the way --

THE COURT: Within that period?

MR. CHILINGIRIAN: I understand that. And the way -- and the way the pleadings are crafted, and the way the order is -- now, don't forget I interpret the pleadings differently, I interpret the order differently, I've raised the motion -- I think -- I understand the timeliness issue, all those things. As an officer of the court, your Honir, I'm acknowledging that my client has no proof: '84 to 85, in that period, but we do have proofs, we believe, from '84, because logically and common sense, it would have to be backwards in time. And I think there're substantial documents that have been obtained through discovery. And I think the issue should go forward on that basis, I think.

THE COURT: fAll right. I'll hear from defense counsel then.

MR. LYNAM: Well, thank you, your Honor.

Notwithstanding Mr. Chilingirian's differences with the Court's interpretation of things, the -- the

Defendant is -- is fully in agreement with all that the Court has said.

Moreover, your Honor, I think that in light of the Plaintiffs' admission that they have no proofs to substantiate their claim, I would like to address, if I may, a motion for summary judgment at this time, and dismissal of this matter.

And -- and just very briefly, your Honor, I would like to, in support of that, say that the Defendnts in this case, and the Plaintiffs, are bound by a lease contract. There's no dispute that that contract has been in effect since the early 1970's, and continues in effect today.

In -- it's also undisputed, and the Plaintiffs don't -- don't claim otherwise, that that lease contract was modified by an order of the Supervisor of Wells of the State of Michigan, Department of Natural Resources, on June 30th, 1974, and that the provisions in that were in effect -- to the extent that they affected the share that would be paid to the Plaintiffs.

The lease contract gives the Defendant the right to take possession of the oil that is produced from the leased premises; that also is not in dispute. And it doesn't matter whether we took that oil out of the ground at midnight, and trucked it at one o'clock in the morning; it doesn't matter. We had a right that is undisputed, to take possession of that oil, and to market that oil, and sell it to third persons. That's also undisputed.

The only claim here by the Plaintiffs is that we breached the lease contract by not paying them their fractional share of the proceeds of sale of that product. And under the lease the Plaintiffs only become entitled to receive those when the oil is sold. If we produce these wells into large tanks over a six-month period, and didn't sell any of it, we would not owe the Plaintiffs anything, at that point. It's only when the product is sold, and that's why the Plaintiffs have the burden of proof: That we sold oil that we did not pay them for, because they owned an interest in that oil when we produced and sold

it.

The Plaintiffs have admitted that they have no proofs that we sold the oil to anybody.[8] That we -- they say we can't prove when it was produced, and we can't prove that they sold it to anybody, or who they sold it to, or for how much. They've admitted that, your Honor.

In fact, I think Mr. Chilingirian would acknowledge, and I think he has, that the oil -- the -- the volume of oil that they are claiming was produced between November of 1984 and March of 1985 from this field couldn't even have physically been produced from the field. We couldn't even have taken that much oil into our possession from this field, let alone sell it to somebody and be paid for it, in a way that they claim we have hidden from everyone.

Now, I would like to add one more thing, you Honor. As the Court has noted, this case was filed in January of 1987; it's five and a-half years later. The Plaintiffs have -- have made no attempt to ascertain when

this oil was produced, or to whom it was sold.

If they had -- if they had any such proofs, they certainly have had an opportunity to find -- to do investigate and find them. It's not like Mr. Chilingirian says, well, we haven't had an opportunity here to -- to find out, so we can prove it. He's just admitted that despite five and a-half years to look at the situation, to use the powers of this Court, to discover whatever was necessary to maek their proofs, they haven't done it.

And I think that -- that -- on -- in light of the representations made by counsel, it's very clear that there is absolutely no merit to this claim. And we have claimed from day one, your Honor, and we have made it clear, that what happened here was a clerical error, only. You're talking about a cumulative production figure in a report that nobody claims was relied upon for payment of royalties to anybody. It was an internal production report that was used mainly by technical people: engineers.

It is a clerical error; we have explained that to the Plaintiff. We have brough Miss Snyder here to explain that to the jury, if necessary. And it is just absolutely ludicrous that we should have to go forward in this matter, in light of what the Plaintiff has said here.

MR. CHILINGIRIAN; Just in response to the summary judgment --

THE COURT: I really don't interpret it as a motion for summary judgment. It really would appear to me as a -- as a Rule 50 motion, for a judgment as a matter of law in a jury action. That is, it -- it's really a motion in which there -- the Court is asked to determine that there's no sufficient evidentiary basis for a reasonable jury to find for the Plaintiff, based as I take it, on the Plaintiffs' counse;'s representation that he has no proofs to present to the jury that -- in substantiation of this claim.

MR. CHILINGIRIAN: Remember, your Honor, I want to make sure the record's clear. Again the issue

of the amendment of the pleadings, all of those are p[reserved in my argument. But let me address something.

THE COURT: I understand.

MR. CHILINGIRIAN: I don't admit -- I don't admit -- two things I don't admit. Number one, I don't admit that they didn't do this. I admit that it wasn't during specific period of time that is crafted in these pleadings, and is, at least by way of this Court rule, and the liberal amendments, should be allowed, and should be allowed to be presented.

By way of example, your Honor, if I've got in all this information, and it wound up that it was actually found out that it was seven months earlier. Your Honor could amend the pleadings, could permit amendment to the pleadings to conform to the proofs. And that's why I think it's just patently unfair.

But let me address something. I don't admit that they didn't sell it. The point is, your Honor, 881.000

barrels of oil were not stored. They don't have that kind of capacity near or at the field. It could have been piped out, it could have been trucked out, and the issues of that were in the documents, and in the records that we were going to present.

What this Court again is doing, I think, is somewhat unfair in terms of a hypertechnical way, and with respect to this --

THE COURT: It's not hypertechnical, I'm just -- I'm just enforcing the --

MR. CHILINGIRIAN: I understand.

THE COURT: -- I'm restricting you to the claim that you made in your -- in your amended complaint a long while ago, and then to the statement of your claim as --as presented in the final pretrial order, and not allowing you to go beyond that on a motion that was filed a few hours before the jury trial was to begin.

MR. CHILINGIRIAN: Okay. One other -- one other --

THE COURT: I'm not, I don't think I'm being hypertechnical.

MR. CHILINGIRIAN: Judge, I apologize. I think you're enforcing the orders as you undertand them. I hope the Court again -- reasonable minds differ, and that's --

THE COURT: I understand.

MR CHILINGIRIAN: -- where I'm from.

Now, I want to address what you said. I don't agree that I can't prove that it was sold. I -- I don't agree with that. I may very well be able to do that, your Honor, either by inference or by direct testimony, if it ever got to the jury.

The issue about the delays, I want the Court to know, that -- again I want the record to be clear -- in -- when I -- when I got into the case in 1989, everything that was accomplished from '89 until your Honor got this -- this file -- it was before Judge Duggan first, and when your Honor got the file was when I first got in.

Your Honor hit the bench, and I apologize, I don't recall the exact date, but it was at or near the time that I got into this case.

THE COURT: I've been here since January 1989.

MR CHILINGIRIAN: Right. I got into the case March of

89.

THE COURT: All right.

MR. CHILINGIRIAN: -- so it's three months after your Honor got --

THE COURT: Okay.

MR. CHILINGIRIAN: -- and you got the file, I think, shortly after you got on the bench.

THE COURT: It came --

MR. CHILINGIRIAN: It was not your file originally.

THE COURT: It came -- it came from Judge Duggan --

MR. CHILINGIRIAN: Right.

THE COURT: -- as -- as I've previously indicated. It was his case originally, and then it was transferred over to me --

MR. CHILINGIRIAN: Yeah.

THE COURT: -- when I took the bench.

MR. CHILINGIRIAN: Yeah. Since 1989, your Honor, I do not believe any of the trial dates -- and again I -- I want to stand corrected on this -- there were no adjournments by the parties, I do not believe. I believe they were -- if there were any because of scheduling, was the Court's. And again it's not a -- I understand the Court's been awfully busy, so any of the delays from '89 to '92, till now, has not in any way -- any motions to adjourn have never occurred by this side; and I don't think counsel has file any motions to adjourn.

THE COURT: Well, I'm just -- the point I'm making is this --

MR. CHILINGIRIAN: It's an old case.

THE COURT: -- it's been five and a-half years --

MR. CHILINGIRIAN: Yes, yes.

THE COURT: -- to get this thing in order --

MR. CHILINGIRIAN: Okay.

THE COURT: -- so that the Court knows, and the jurors know, and so forth, what it is that's being claimed by the Plaintiffs, and the --

MR. CHILINGIRIAN: Every --

THE COURT: -- and to now --

MR. CHILINGIRIAN: every document --

THE COURT: -- ask them to consider claims that are only being made as of a few hour ago --

MR. CHILINGIRIAN: I understand, every --

THE COURT: -- is not fair --

MR. CHILINGIRIAN: -- every --

THE COURT: -- in my estimation.

MR. CHILINGIRIAN: -- every piece of paper, your Honor, that I have, and -- and --and when Mr. Lynam says the powers of this Court -- your Honor, every piece of discovery that was accomplished was done

in terms of the document exchanges. There is certainly numerous documents, and -- and if the Court would want, I could identify them, but it's not necessary -- I'm making the representation to this Court that reasonable jurors could infer from the documents, that it isn't a clerical error -- maybe.

And I also have to tell this Court, back in February, when your Honor ruled, when we had this hearing, I told the Court without Wronski and Streeter in front of this jury, your Honor, I don't have the ability to prove essentially a course of conduct, and a course of dealing --

THE COURT: That's -- that's a different issue.

MR. CHILINGIRIAN: I'm just -- I'm just trying to show the Court what the difficulty has been. You -- you don't have a case, you know, in isolation by itself.

And by taking a step back, let me tell the Court this. When it first came up, we had been prepared because of this problem to voluntarily dismiss without

prejudice; they wouldn't accept it. I know the Court had heard them, essentially an oral motion on that, and it was denied, and it's in the form of an order. We in no way, shape, or form --

THE COURT: Well, you made a proposal to dismiss your case, if they would relieve you from paying some $12,500 in --

MR. CHILINGIRIAN: Sanctions, yes, that's right.

THE COURT: -- sanctions that I'd assessed against you for --

MR CHILINGIRIAN: That's right, that is correct, that's correct.

THE COURT: All right.

MR. CHILINGIRIAN: What I'm pointing out, I guess, is this, your Honor: The Plaintiffs have always know the difficulty in these proofs, and to the extent that you have record keeping, and to the extent that you have those kins of documents that could be presented,

certainly when you present them as the case unfolds, those documents will inherently on their face, suggest logic and common sense.

And what I guess I'm saying to the Court is, again as an officer of the court, I agree that there are no proofs forward; there are substantial proofs, your Honor, substantial --

THE COURT: All right.

MR. CHILINGIRIAN: -- documents back. Thank you.

THE COURT: Okay. Well, it's clear then, however, that you're unable to present any proofs that the -- that the oil was removed surreptitiously, or otherwise, by the Defendant, with no compensation paid to the Plaintiffs during the period November 1984 through March of 1985, is that correct?

MR. CHILINGIRIAN: That's correct, your Honor.

THE COURT: All right. Well, under those

circumstances, it seems to me that there's no -- there are no issues, or no proofs available to be presented to the jury. There's nothing on which the jury could base a verdict in favor of the -- of the Plaintiffs.

Rule 50 of the Federal Rules of Civil Procedure, provide as follows, and I quote:

> "If during a trial by jury, a party has been fully heard with respect to an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party, with respect to that issue, the court mayh grant a motion for judgment as a matter of law against that party, on any claim that cannot under the control of law, be maintained without a favorable finding on that issue."

It seems to me that that's the basis of the motion, rather than Rule 56, which is a summary judgment motion. But whichever it is, either under Rule 50, or Rule 56, the Plaintiff -- from the Plaintiffs' own

representations to the Court this morning, through counsel as an officer of the court, cannot prevail in this case. And therefore, under those circumstances, judgment will be entered for the Defendant in the -- in this case; costs to the Defendants.

MR. CHILINGIRIAN: Your Honor, for the record, the Court is acknowledging my arguments with respect to the --

THE COURT: Pardon me?

MR. CHILINGIRIAN: -- amendment, just so that the record is clear, the Court has acknowledged that I've raised the issues of the liberal rules of amendment, and the procedure that it can even be accomplished after proofs --

THE COURT: You've made -- you've made your record on that. I've denied -- I've denied your motion for leave to amend your -- your pleadings, amend your complaint again, and your motion to amend the -- the pretrial order.

And I've also denied your motion to introduce in your proofs, the opinion of Judge Streeter, and the -- and the decision of the Michigan Court of Appeals in Wronski v. Sun Oil. Yes, I've made those rulings, and that's part of the record here at this time.

All right. If there's any -- if there's nothing further, I'm going to call the jurors in and inform them that there's -- there'll be no further need for their services. You can remain in the courtroom, or you can depart before I make my closing remarks to the jury, as you wish.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH.

Plaintiffs,

VS.

NO.: 87-CV-70451DT
HON. Paul V. Gadola
Entered: July 8, 1992

SUN EXPLORATION AND PRODUCTION COMPANY and SUN OPERATING LIMITED PARTNERSHIP.

Defendants.
_____/

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_____/

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_____/

FINAL PRETRIAL ORDER

At a session of said Court held in the United States District Court for the Eastern District of Michigan, Southern Division, in the City of Detroit, County of Wayne, State of Michigan,

On June 8, 1992

PRESENT: Hon.Paul V. Gadola
U. S. District Judge

This Final Pretrial Order having been submitted to the Court, and the parties, through counsel, having appeared before this Court on June 8, 1992; and the Court being otherwise advised;

NOW IT IS HEREBY ORDERED:

1. Jurisdiction. Jurisdiction is based upon diversity under 28 U.S.C. Section 1332 and is not disputed by the parties.

2. Plaintiffs' Claims. Plaintiffs' claims under Counts I-IV of the Amended Complaint have been dismissed with prejudice by prior Orders of this Court. Certain legal issues contained in Count V have been ruled upon as more specifically indicated infra.

Plaintiffs allege that in November of 1984 through March of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field between November, 1984 and March, 1985 for which Plaintiffs were not compensated. Plaintiffs further allege that "said figures

1984 and March, 1985 for which Plaintiffs were not compensated. Plaintiffs further allege that "said figures were subsequently removed from the production records after an inquiry was made by Eugene Koziara." (Amended Complaint, Paragraphs 45 and 46; Plaintiffs' Claims, submitted October 30, 1990).

Plaintiffs allege that Defendants removed the 881,071 barrels of oil through surreptitious means and conveyed it to other fields within the State of Michigan without compensating Plaintiffs. (Amended Complaint, Paragraph 47).

Plaintiffs allege that the unaccounted-for production came "in large part" from Tract 6 of the field. (Amended Complaint, Paragraph 48).

Plaintiffs allege that, under the laws of the State of Michigan it is a felony to illegally report production and that such laws create "a fiduciary duty to persons such as Plaintiffs on the part of Sun Oil Company". (Amended Complaint, Paragraph 49).

Plaintiffs claim that as a result of Defendants' breach of fiduciary duty, and failure to compensate Plaintiffs for their share of the allegedly unaccounted-

for oil, Plaintiffs have been financially damaged to their detriment. (Amended Complaint, Paragraph 50).

Plaintiffs' claims based upon the statutory creation of a fiduciary duty have been previously ruled upon by this Court in its Order of November 1, 1988 (see pages 9 and 10) to be a failure to state a claim.

Plaintiffs intend to file a Motion to Amend their pleadings to allow for testimony regarding Count V dealing with the time period of June 1974 through March 1985 as it relates to Tracts 1 and 2, along with Tract 6, pertaining to unaccounted-for oil that was produced.

3. Defendants' Claims. Defendants admit that the Monthly Summary of Operations Reports for November, 1984 through March, 1985, showed an additional 881,071 barrels of oil under the columns entitled, "Cumulative Since Project" and "Cumulative Since Discovery", but aver that such entries in said reports were the result of a clerical error regarding production prior to unitization of the Columbus III Field. (Answer, Paragraph 45).

In answer to Plaintiffs' claim that such production was removed from production records, Defendants admit

that the clerical error was subsequently corrected. (Answer, Paragraph 45).

Defendants aver that the 881,071 barrels of oil were produced from the Columbus III Field prior to the June 30, 1974 unitization of the field. (Answer, Paragraph 46 and Affirmative Defenses, Paragraph 1).

Defendants deny that such production came "largely from Tract 6". (Answer, Paragraph 48).

Defendants deny that they "surreptitiously removed" oil from the Columbus III Field and moved it to any other field in Michigan or that oil was removed without properly compensating plaintiffs. (Answer, Paragraph 47).

Defendants assert that Plaintiffs held no interest in the subject property until June, 1984. (Answer, Paragraph 46 and Affirmative Defenses, Paragraph 1).d

Defendants deny that their actions have damaged Plaintiffs in any way. (Answer, Paragraph 50).

4. Stipulation of facts. None.

5. Issues of fact to be litigated.

A. What property interest is held by Plaintiffs and when did they acquire

it?

B. Did Defendants remove oil from the Columbus III field between November, 1984 and March, 1985, which was not properly accounted for?

   i. If so, to where was it removed?

   ii. Was it sold? If so, to whom?

   iii. What revenues, if any were realized from the sale?

   iv. Who received such revenues and when?

   v. If no revenues were received, what was the value of such oil?

C. If Defendants did remove oil that was not properly accounted for, how much oil was so removed?

   i. Of such oil, how much is attributable to Plaintiff's interest?

   ii. What is/was the value of such oil?

   III. What are Plaintiffs' damages as a result of such removal?

D. Was the additional 881,071 barrels of oil shown under the two columns of Defendants' Report to working interest owners between November, 1984 and March, 1985, the result of a clerical error?

6. Issues of law to be litigated.

A. What is the extent and nature of the Plaintiffs' interest in the oil field at the time the alleged fraudulent production occurred?

B. To the extent Plaintiffs establish liability, can the Court determine as a matter of law the rate at which Plaintiffs should be compensated?

7. Evidence problems likely to arise at trial.

Plaintiffs have indicated an intent to introduce evidence relating to events prior to the November 1984 - March 1985 period during which the alleged improper production took place. Defendants dispute the relevance of such evidence.

Plaintiffs intend to file a Motion in limine

regarding the admissibility and effect of the 1974 opinion of Judge Streeter and the Michigan Court of Appeals decision in Wronski v Sun Oil, 89 Mich App 11 (1979) based upon their right to have the jury determine Defendants' credibility relating to the issue of alleged unaccounted-for production of oil.

Defendants object to Plaintiffs' stated intention to call as witnesses M. Y. Joshi and James Sloan.

8. Witnesses. Plaintiffs may call the following witnesses:

A. Edgar J. Dietrich

B. Theresita Dietrich

C. Eugene Koziara

D. Peggy Snyder

E. Catherine Richardson

F. Lee Rae Otto

G. M. Y. Joshi

H. James Sloan

I. Such rebuttal witness(es) as the Court may allow.

Defendants may call the

following witnesses:

J. Any of the above witnesses.

K. Joe Martin

L. Ray Ellison

M. Ben Jonson

N. Rod DeGraw

O. Such rebuttal/surrebuttal witness(es) as the Court may allow.

9. Depositions. Either party may introduce the deposition testimony of Lee Rae Otto taken on July 24, 1985 in Case number 74-4776-NZ, St. Clair County Circuit Court.

Either party may introduce the deposition testimony of Ray Ellison taken de bene esse in this case on May 15, 1992.

10. Exhibits. Exhibit lists of the parties are attached hereto.

11. Damages. Plaintiffs claim that between November, 1984 and March, 1985, Defendants produced 881,071 barrels of oil from the Columbus Field, in which Plaintiffs claim an interest. Plaintiffs damages are measured by the highest value for which such oil is

shown to have been converted during the period from November, 1984 and March, 1985, multiplied by the participation factor as set forth in the Order of Unitization issued by the Supervisor of Wells, Michigan Department of Natural Resources, on June 30, 1974, attributable to the interest owned by Plaintiffs.

12. Trial. Plaintiffs have requested a jury trial. Estimated length of trial is 3 days.

13. Settlement. Counsel for the parties have discussed possible settlement at length. Although the possibility of settlement seems remote at this time, counsel will continue to discuss same.

14. Filing of Trial Briefs, Findings, and Instructions. Trial briefs and requests for instructions shall be filed at least one week prior to the first day of the trial term.

PAUL V. GADOLA
U.S. District Court Judge

APPROVED, June 8, 1992

JACK C. CHILINGIRIAN
Attorney for Plaintiffs

Dated: June 1, 1992

TERENCE V. LYNAM
Attorney for Defendants

Dated: June 1, 1992

R.7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIETRICH et al.,
Civil Action

Plaintiff(s),

No.: 87-70451

vs.

HON. PAUL V. GADOLA
U.S. DISTRICT JUDGE

SUN EXPLORATION April 14, 1992
Defendant(s).
_____/

IMPORTANT: YOU WILL RECEIVE NO FURTHER NOTICE OF THESE DATES.

AMENDED ORDER RE:

1. Scheduling discovery;

2. Setting date for filing of final pre-trial order;

3. Setting date of final pre-trial conference;

4. Setting tentative trial term;

5. Providing for content of final pre-trial order and describing materials to be prepared and to be made available to the court and counsel.

I. Computation of time under this order and under any notice of any scheduling order or notice in this cause shall be in conformity and accordance with Federal Rule of Civil Procedure 77.1.

II. ALL DISCOVERY must be completed by

N/A_____. This Court will not order discovery to take place subsequent to that date.

III. Names of all witnesses, lay and expert, MUST BE EXCHANGED by ___N/A_____.

IV. Dispositive motions due by filed and decided.

V. Referral to mediation panel will be made _____.

VI. Also, a settlement conference may be subsequently scheduled if the court deems it appropriate.

VII. Date and time of final pre-trial conference: 6/8/92 at 2:00 pm.

TRIAL COUNSEL MUST BE PRESENT AT THE FINAL PRE-TRIAL CONFERENCE AND HAVE SETTLEMENT AUTHORITY.

VIII. Final pre-trial order shall be submitted to the Court not later that 6/1/92_.

IX. Trial will be held in trial term beginning 7/1/92. The court utilizes a trailing trial docket.

X. Jury XX Non-jury ____ Estimated length of trial:

XI. At least one week prior to beginning of trial term, all counsel shall furnish to the court the following:

1. A trial brief.

2. A list of all exhibits marked consecutively, as well as copies of all exhibits (to the extent possible) for use on the bench. All exhibits will be received prior to trial, except those where an objection is noted. With reference to those exhibits, they will be received during trial at the proper time.

3. In jury cases, any requests for voir dire and proposed jury instructions.

4. In jury cases, motions in limine.

5. In non-jury cases, proposed findings of fact and conclusions of law.

XII. Other Matters: _____

_____

_____

_____

_____

_____

_____

XIII. IT IS ORDERED that counsel for plaintiff(s) assume the responsibility for convening a conference for all parties to collaborate in the formulation of a short , concise pretrial order that is to be drafted by counsel for plaintiff(s), approved and signed by counsel for all parties, and submitted to the Court for approval and adoption. The order should provide for the signature of the Court, which, when signed, will become an Order of the Court. AN ORIGINAL AND ONE COPY IS TO BE FILED WITH THE COURT.

The proposed pretrial order shall strictly comply with the provisions and requirements of Local Rule 16.2, except as this court may otherwise provide.

LOCAL RULE 16.2

(a) Joint Final Pretrial Order

A Joint Final Pretrial Order shall be furnished in every civil case at or before the time set for the final pretrial conference.

(NOTE: THIS COURT REQUIRES THAT THE JOINT FINAL PRE-TRIAL ORDER BE FURNISHED AT LEAST ONE WEEK BEFORE THE TIME SET FOR THE FINAL PRE-TRIAL CONFERENCE.)

Counsel for plaintiffs shall convene a conference for all parties to confer and collaborate in formulating a concise Joint Final Pretrial Order that is to be compiled by counsel for plaintiffs, approved and signed by counsel for all parties, and submitted by counsel for plaintiffs to the Court for approval and adoption. The Order shall provide for the signature of the court, and, when signed and filed in the Clerk's office, becomes an Order of the court superseding the pleadings and governing the course of the trial unless modified by further Order, provided, however, that the pretrial order shall not constitute a vehicle for adding claims or defenses. An original and one copy is to be submitted to the chambers of the assigned Judge. The Order will not be filed in the Clerks office until it has been signed by the Judge.

(b) CONTENTS OF ORDER

The Joint Final Pretrial Order shall contain, under numbered and captioned headings, the following:

(1) Jurisdiction. The parties shall state the basis for federal court jurisdiction, and whether jurisdiction is contested by any parties.

(2) Plaintiffs' claims. A statement of the claim or claims of plaintiffs, including legal theories.

(3) Defendants' claims. A statement of the defenses or claims of defendants or third parties, including legal theories.

(4) Stipulation of facts. The parties shall state, in separately numbered paragraphs, all uncontested facts.

(5) Issues of fact to be litigated.

(6) issues of law to be litigated.

(7) Evidence Problems likely to arise at Trial. Include objections to exhibits. All motions in limine of which counsel should reasonably be aware shall be listed in the Joint Final Pretrial Order.

(8) Witnesses. Each party shall list the names of all witnesses, identifying which are experts, that it will call (in the absence of reasonable notice to the contrary to opposing counsel), and those witnesses it may all. No witnesses shall be listed who has not been included on any witness list submitted pursuant to a prior order of the Court. Only listed witnesses will be permitted to testify at trial, except for rebuttal witnesses whose testimony could not be reasonably anticipated before trial, or except for good cause show.

(9) Depositions. The parties shall list the names of all witnesses whose deposition testimony is reasonably expected to be offered as evidence. Nothing in this subsection shall preclude the taking of de bene esse depositions for use at trial.

(10) Exhibits. The parties shall number and list, with a short identifying description, each exhibit they intend to introduce at trial. Only listed exhibits will be considered for admission at trial, except for rebuttal exhibits that could not be

reasonably anticipated before trial, or except for good cause shown.

(11) Damages. Plaintiffs shall itemize all claimed damages, shall specify damages that can be calculated from objective data, and the parties shall stipulate to those damages that are not in dispute.

(12) Trial.

(a) Jury or non-jury.
(b) Estimated length of trial.

(13) Settlement. Counsel shall state that they have conferred and considered the possibility of settlement, giving the most recent place and date thereof, and indicate the current status of negotiations, as well as any plans for further discussions.

(c) Failure of Counsel to Cooperate.

Failure of counsel to cooperate in the preparation of, to submit, or to strictly comply with the terms of, the Joint Final Pretrial Order may result in dismissal of claims, default judgment, refusal to let witnesses testify or to admit exhibits, assessment of costs and expenses, including attorney fees, or other appropriate sanctions.

(d) Filing of Trial Briefs, Findings, and Instructions

The Joint Final Pretrial Order shall further provide that trial briefs, proposed findings of fact and conclusions of law in non-jury cases or requests for instructions in jury cases shall be filed in the first day of trial.

(NOTE: THIS COURT REQUIRES THAT THE TRIAL BRIEFS, REQUESTED VOIR DIRE QUESTIONS, EXHIBIT LISTS, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN NON-JURY CASES OR INSTRUCTIONS IN JURY CASES SHALL BE FILED AT LEAST ONE WEEK PRIOR TO FIRST DAY OF TRIAL TERM FOR THIS CASE.)

(e) Additional Requirements.

A Judge, in an appropriate case, may add additional requirements to the Joint Final Pretrial Order, or may suspend application of the rule in whole or in part.

_____
PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Date:_____

UNITED STATES DISTRICT COURT **R.8**
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDGAR J. DIETRICH and
THERESITA DIETRICH,

Plaintiffs,

vs

Case No. 87-70451
Hon. Paul V. Gadola
Entered Feb. 10, 1992

SUN EXPLORATION AND
PRODUCTION COMPANY &
SUN OPERATING LIMITED
PARTNERSHIP,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This suit involves a royalty interest in tracts of land in the Columbus III oil field in St. Clair County, Michigan. The field is leased to and operated by defendants Sun Exploration Company and Sun Operating Limited Partnership. Plaintiffs Edgar J. and Theresita Dietrich filed their five-count amended complaint April 11, 1988. Count II of plaintiffs' amended complaint has

been dismissed. After numerous motions, including two by defendants for dismissal, defendants have now filed the instant motion for summary disposition (sic). This court will treat the motion as a motion for summary judgment under Fed. R. Civ. P. 56.

FACTS

On November 29, 1971, the owners of Tracts 1, 2 and 6 of the Columbus III oil field, Frank Koziara, Aniela Koziara and Eugene Koziara, assigned a 1/32 overriding royalty interest in Tract 6 and a 1/24 overriding royalty interest in Tracts 1 and 2 to the law firm of Dietrich & Shrauger, P.C. (1.fn) On June 1, 1972, the law firm assigned its interest to Helen Spalter, the mother of plaintiff Edgar Dietrich, for life, remainder to Katherine Dietrich, Edgar Dietrich's daughter. Helen Spalter died on March 25, 1982. On June 1, 1984, the remainder person, Katherine Dietrich, reassigned her interest to plaintiffs.

In the mid-1970's, the Koziaras and the Wronskis, who also owned part of the Columbus III oil field, brought suit in St. Clair County Court to rescind their leases with Sun Oil Company, defendants' predecessor, or, in the alternative, for

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(1.fn) In a previous transaction, defendants' predecessor had transferred part of its working interest back to the Koziaras. It is from this working interest regained by the Koziaras that plaintiffs hold their overriding royalty interest, not from the Koziaras' royalty interest held as a consequence of land ownership.

An "overriding royalty interest" has been defined as a fractional interest in the gross production of oil and gas under a lease, in addition to the usual royalties paid to the lessor, free of any exploration or production costs. Meeker v. Ambassador Oil Co., 308 F.2d 875, 822 (10th Cir. 1963), rev'd on other grounds, 375 U.S. 160 (1964). Only when oil and gas are reduced to possession does the interest attach. Mulsow v. Gerber Energy Corp., 697 P. 2d 1269, 1273 (Kan. 1985).

damages from Sun Oil's overproduction of oil from the pool beneath the Koziaras' and Wronskis' properties. At the time of the overproduction, the Michigan Supervisor of Wells had put a proration order in effect, which limited the production of oil from the pool.

The trial court, Judge Streeter, presiding, found that Sun Oil had intentionally and illegally overproduced oil from the field, and that 50,000 barrels of this oil had been illegally drained from the Wronskis' and the Koziaras' tracts. Wronski v. Sun Oil, Nos. 101-7 and 103-7 (St. Clair Cir. Ct. Dec. 21, 1976) ("Streeter Opinion"). The Michigan Court of Appeals affirmed this decision except as to the trial court's computation of damage. Wronski v. Sun Oil Co., 89 Mich App. 11 (1979). leave denies. 407 Mich. 863 (1979) ("Wronski I"). The Michigan Court of Appeals awarded damages as follows:

> The total damages awardable in this case is $251,000 based upon the conversion of 50,000 barrels of oil valued at $5.02 per barrel. Plaintiffs Koziara are entitled to $187,815.85 due to their ownership of 72.835% of the converted oil. Plaintiffs Wronski are entitled to $68,189.15 due to their ownership of 27.165% of the converted oil.

Wronski, 89 Mich. App. at 29 n.10.

The Koziaras and the Wronskis filed another

lawsuit against Sun Oil in 1975 in Ingham County Circuit Court seeking review of two orders issued by the Supervisor of Wells and the Appeals Board. The Wronskis and the Koziaras were challenging the supervisor's decision to grant Sun Oil's request for unitization of the Columbus III field.

> Unitization is a process which permits an entire field to be operated as a single entity without regard to surface boundary lines. When a field is unitized the owners of property within the drilling range are awarded a royalty interest in the whole of what is produced.

Wronski v Sun Oil Co., 108 Mich. App. 178, 181 (1981) ("Wronski II").

The Circuit Court denied the Koziaras' and the Wronskis' request for review of the supervisor's decision, and the Michigan Court of Appeals affirmed. Id.

Neither plaintiff, nor their predecessors in interest, i.e., Dietrich & Shrauger, P.C., Helen Spalter or Katherine Dietrich, were parties to either Wronski I or

Wronski II. Further, in neither Wronski I nor Wronski II did the judge refer to plaintiffs' predecessors' overriding royalty interest.

Plaintiffs brought the present action in Wayne County Circuit Court. In their five-count complaint plaintiffs allege that defendants had illegally drained 36.417.5 barrels of oil from tracts 1, 2 and 6 as found by Judge Streeter in Wronski I (Count I) (2.fn); that defendants illegally overproduced oil from the

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(2.fn) The Michigan Court of Appeals in Wronski I found that 50.000 barrels of oil had been converted and that the Koziaras owned 72.835% of the oil. Wronski, 89 Mich. App. at 29 n.10. The 36,417.5 barrels pleaded by plaintiffs is 72.835% of 50,000 barrels.

fields in addition to the overproduction found by Judge Streeter, in breach of an alleged fiduciary duty to plaintiffs (Count II); that defendants negligently or intentionallyh breached their duty to plaintiffs by failing to use the care and skill of an ordinary and prudent oil producer, including underreporting oil reserves,

sabotaging the well by pouring cement into it and persuading geologists and other witnesses to give false testimony (Count III); that defendants fraudulently induced plaintiffs or their predecessors to sign the unitization agreement (Count IV); and that defendants failed to compensate the plaintiffs for 881.071 barrels of oil allegedly produced by defendants (Count V).

Defendants removed the action to this court based on diversity. Plaintiffs subsequently amended their complaint. Further, Count II of the amended complaint was dismissed by the parties. Defendants have now filed the instant motion for summary judgment. Plaintiffs have filed a response and defendants have filed thir reply.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have (the) effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect (the) application of appropriate principle(s) of law to the rights and obligations of the parties. (Citation omitted.) Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See Gregg

v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'show' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); Gregg, 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving

> party for a jury to return a verdict for that party. If the (nonmovant's) evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omited); See Catrett, 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). Anderson, 477 UJ.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact.

ANALYSIS

The analysis of the defendants' motion for summary judgment will proceed according to the four remaining counts of the plaintiffs' complaint.

A. Count I – Illegal Drainage & Failure to Compensate

Defendants claim that plaintiffs cannot prove that Sun Oil dranied 36,417.5 barrels of oil from Tracts 1, 2 and 6. Defendants point to a lack of expert testimony and to the time and property interest discrepancies between Wronsi I and the instant case. Plaintiffs state that expert testimony is not necessary to show defendants' wrongdoing and that Wronski I is sufficiently similar to the facts in this case to allow the use of offensive collateral estoppel. This court agrees that plaintiffs' experts and the expert testimony used in the Streeter Opinion are insufficient to establish defendants' alleged illegal drainage of oil from Tracts 1, 2 and 6. The use of Wronski I in this case is limited because of the time and property interest discrepancies.

Plaintiffs claim that defendants drained oil from Tracts 1, 2 and 6 of the Columbus III oil field. This has conclusively been established in Wronski I, and

defendants cannot relitigate that issue. However, Wronski I merely establishes, for purposes of this case, that defendants are liable for illegal drainage of the Wronskis' and Koziaras' properties from the period February 1, 1970, to June 30, 1974. Plaintiffs have not held an interest in the oil for that entire period of time. Plaintiffs and their successors in interest have held the overriding royalty interests from November 1, 1971, to June 30, 1974. While 36,417.5 barrels were drained from the Koziaras' property during the 53-month period at issue in Wronski I, there is no indication of the amount of oil drained from the Koziaras' property during the 32-month period at issue here. As there might not have been a steady stream of oil drainage during that time, a simple mathematical percentage may not be appropriate. Plaintiffs' reliance on the Streeter Opinion is therefore misplaced. Expert testimony is needed to establish this data. As plaintiffs have not offered an expert to establish this point in the case, defendants must

prevail on their motion for summary judgment on Count I.

B. Count III – Intentional or Negligent Breach of Duty

In the instant case, defendants are oil and gas producers under an oil and gas lease with the Koziaras. Under Michigan law, an oil or gas producer has a duty to act as a reasonable and prudent oil producer in operating the field and in producing the oil or gas. See Michigan Wis. Pipeline Co. v. Michigan Nat'l Ban, 118 Mich. App. 74. 82-83, 84 (1982); see also Compton v. Fisher-McCall, Inc., 298 Mich. 648, 653 (1941). Plaintiffs' claim in Count III revolves around the allegation that defendants have not acted as resaonable or prudent oil producers.

Plaintiffs assert that defendants negligently or intentionally breached their duty of care in interpreting gas and oil porosity, gas and oil net pay, oil-water contact and other geological and petroleum reservoir

data. Plaintiffs also allege that defendants withheld information about the 6-3 well of the Columbus III oil field by underreporting the oil reserves contained in the well and that defendants sabotaged the well by pouring cement into it. Plaintiffs further allege that defendants provided geologists and other witnesses who were willing to give false testimony at the unitization hearing. Plaintiffs have offered the affidavit and report of Dr. M.Y. Joshi, a petroleum engineer to prove the existence of a genuine issue of material fact in order to avoid defendants' motion for summary judgment.

Defendants have offered the Proposal for Decision, Koziara v. Sun Oil Co., (Mich Dep't Nat. Resources May 25, 1988) (Fulkerson, A.L.J.) ("Fulkerson Proposal") and the Order of the Supervisor of Wells, Koziara v. Sun Oil Co., No. (A) 1-5-73 REMAND (Mich. Dep't Nat. Resources March 22, 1989) ("Order of the Supervisor"), aff'd sub nom. Wronski v. Sun Exploration and Prod. Co., No. 79-22915-AA (Ingham

Cir. Ct. June 12, 1991) (Stell. J.). The Order of the Supervisor adopted the Fulkerson Proposal as the opinion of the supervisor. Plaintiffs were notified of, attended and participated in these hearings. (3.fn) Michigan recognizes the res judicata effect of administrative proceedings. Story v. Meijer, Inc., 431 Mich. 368, 373 n.3 (1988); Harris v. Harlan Elec. Constr. Co., 101 Mich. App. 155, 159 (1980); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). Because the Order of the Supervisor has been affirmed by Judge Stell of the Ingham County Circuit Court, the Fulkerson Proposal shall be given preclusive effect.

(3.fn) See Plaintiffs' Resp. at para. 17.

Most of the issues raised by plaintiffs were raised before Administrative Law Judge Fulkerson and the Supervisor of the Wells. The oil-water contact issue was

litigated before A.L.J. Fulkerson and decided not to be unreasonable. (4.fn) The porosity issue as also decided by A.L.J. Fulkerson in Sun Oil's favor. (5.fn) The entire thrust of the Fulkerson Proposal is that the gas and oil net pay scheme devised by Sun Oil was adequate and reasonable. Further, the 60% current production/40%. volumetrics participation was found to be reasonable. (6.fn)

The fact that Sun Oil did not use a core analysis was considered to be of no consequence to A.L.J. Fulkerson. (7.fn) The isopaching issue was ound to be "a _____

(4.fn) Fulkerson Proposal at 19, 22.

(5.fn) Id. at 19.

(6.fn) Id. at 21-23. This issue arises from Dr. Joshi's Report at para. 1 (Pls.' Ex. B).

(7.fn) Fulerson Proposal at 19. This issue also arises from Dr. Joshi's Report at para. 4 (Pls.' Ex. B).

fair and equitable presentation of the value for oil or each tract when compared to the other tracts in the pool."

(8.fn) The planimetering error was found to be corrected, otherwise being insignificant. (9.fn) Finally, A.L.J. Fulkerson definitively found that Sun Oil did not cement the 6-3 well and that Sun Oil would have nothing to gain from doing so. (10. fn)

The last issue raised by plaintiffs, that defendants procured and provided geologists and other witnesses to falselyh testify before the unitization hearing, is an issue to be brought before the Michigan Department of Natural Resources to collaterally attack the unitization order. As neither party is challenging that order and as the Fulkerson Proposa, the Order of the Supervisor and its affirmance from Judge Stell are not being collaterally attacked, then the issue of perjury or its subornation is not before this court.

Because all of the allegations have been precluded or shown to be irrelevant to plaintiffs' case, defendants' motion for summary judgment on Count III of

---

(8.fn) Fulkerson Proposal at 20. This issue also arises from Dr. Joshi's Report at para. 5 (Pls.' Ex. B).

(9.fn) Fulkerson Proposal at 20. This issue also was brought up by Dr. Joshi in his report at para. 6 (Pls.' Ex. B).

(10.fn) Fulkerson Proposal at 14.

plaintiffs' complaint shall be granted.

C. Count IV -- Fraudulent Inducement

In this count, plaintiffs essentially charge defendants with misrepresenting certain facts to their predecessors, other landowners and the Michigan Department of Natural Resources. Plaintiffs state that because of these misrepresentations, plaintiffs' and/or their predecessors were induced to sign the unitization plan. Because the unitization plan was signed, plaintiff sllege that they were denied their fair share of the unitization production and lost out on royalty revenues due them.

Defendants indicate that plaintiffs' concerns with the unitization plan were addressed by the Fulkerson

Proposal and are therefore barred by collateral estoppel. Defendants further state that they did not make any misrepresentations to the plaintiffs or any other individuals in privity with the plaintiffs. Additionally, defendants state that any representations, if made, were true. Finally, defendants assert that even if misrepresentations were made to plaintiffs or their predecessors in interest, no harm came to plaintiffs' because of them.

This court agrees with defendants that plaintiffs have failed to carry their burden of production in this motion for summary judgment. Any assertion made by plaintiffs that challenges the fairness and validity of the unitization plan is estopped by reason of the Fulkerson Proposal as adopted by the Order of the Supervisor and affirmed by Judge Stell. Storey, 431 Mich. at 373 n.3. Further, any claim that the defendants acted unreasonably in connection to the unitization plan after its implementation is precluded. See supre pp. 8-11.

In paragraph 31 of the amended complaint plaintiffs state that defendants advised them "that unitization would increase the overall royalties paid to Plaintiffs." Defendants assert that plaintiffs' own expert. Dr. Joshi, admits that unitization enhanced the total oil and gas recovered from the field. (11.fn) Plaintiffs counter this allegation by stating that

> the issue is not whether, in fact, without misrepresentations Plaintiffs would have received the revenues they did or received more had unitization not taken place, but whether, in fact, pursuant to the Unitization Order itself the tract participation formula which was utilized is accurate.

(11.fn) Even assuming that plaintiffs' expert did not agree with the alleged representation that unitization would increase the overall royalties, this statement allegedly made by defendants could easily be read as a hope or opinion, not an assurance given by Sun Oil to plaintiffs. See Wilson v. Kiss, 751 F. Supp. 1249, 1255 (E.D. Mich. 1990); Connellan v. Himelhoch, 506 F.

Supp. 1290, 1296 (E.D. Mich. 1981); Schuler v. American Motors Sales Corp., 39 Mich. App. 276, 280 (1972).

Plaintiffs' Resp. at para. 28. If the issue is whether the tract participation formula was accurate, then plaintiffs again are precluded, as this issue was decided in Sun Oil's favor by A.L.J. Fulkerson. Plaintiffs' predecessors in interest were present at the proceedings initiating the unitization plan, and plaintiffs are therefore bound by A.L>J> Fulkerson's proposal.

Plaintiffs have also failed to produce any evidence that shows that plaintiffs or their predecessors in interest relied upon any misrepresentations made by defendants. Defendants have affirmatively cited the deposition of plaintiff Edgar Dietrich, who acknowledges that no representations alleged in Count IV were made to him. (12.fn) Edgar Dietrich also stated that he had no knowledge of any representation made to Helen Soalter

(13.fn) and that the alleged misrepresentations otherwise stated in Count IV were made to the Supervisor of Wells.(14.fn) Plaintiffs do not offer any rebuttal evidence, either by deposition, affidavit or otherwise, except for the affidavit of Dr. Joshi, who conclusorily states that "(d)efendants clearly misrepresented the facts to the Dietrichs' predecessors

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(12.fn) Edgar Dietrich Dep. at 58, lines 16-19.

(13.fn) 59, lines 18-20.

(14.fn) Id. at 56-60.

to obtain their agreement to the Unitization." (15.fn) Dr. Joshi's bald statement is hearsay at best and would not be presentable as expert testimony at trial. See Anderson, 477 UJ.S. at 249-=50. Further, his statement is not significantly probative. See id. at 250.

Finally, defendants assert that plaintiffs will not and cannot prove damages arising out of the alleged

misrepresentations contained in Count IV. Plaintiffs state that the tract participation formula was not fair and appropriate under the factual circumstances .....(16.fn) Once again, any contention that the tract participation formula was unfair or inaccurate or invalid is precluded by the Fulkerson Proposal and the order implementing the unitization plan. As plaintiffs and their predecessors in interest were present at both, plaintiffs are properly precluded from relitigation the same issues.

Because plaintiffs have failed to set forth specific evidence pointing to a genuine triable issue that plaintiffs or their predecessors in interest were fraudulently induced to agree to the unitization plan, or that plaintiffs were harmed by any alleged misrepresentations by defendants, summary judgment on Count IV _____

_____

(15.fn) Joshi Aff. at para. 14.

(16.fn) Plaintiffs' REsp. at para.30.

is appropriate. Gregg, 801 F.2d at 861.

D. Count V -- Fraudulent Production

In Count V, plaintiffs claim that between November 1984 and March 1985 Defendants produced an additional 881.071 barrels of oil in the Columbus III oil field that had not previously been accounted for. Plaintiffs offer up certain Sun Oil records indicating that 881.071 barrels of oil were produced in this six-month period, but that plaintiffs and other landowners were not given any royalties. Defendants counter that this was a clerical error and offer the affidavit of Ms. Leerae Otto, Sujn Oil's senior accounting assistant, and an interoffice memorandum to support their argument.

As both sides have documentation supporting their theories, there appears to be a genuine issue of material fact as to whether the 881.071 barrel count was a legitimate discrepancy and whether defendants owe plaintiffs royalties on this oil production. Because there is a genuine issue of material fact, summary judgment

will be denied on Count V.

ORDER

For the foregoing reasons, it is hereby ORDERED that defenants' motion for summary judgment is GRANTED on Counts I, II and IV of the amended complaint.

It is further ORDERED that defendants' motion for summary judgment is DENIED on Count V of the amended complaint.

SO ORDERED.

Dated: 2/10/92

PAUL V. GADDLA
United States District Judge

Supreme Court, U.S.
FILED
AUG 29 1994
OFFICE OF THE CLERK

No. 94-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EDGAR J. DIETRICH and THERESITA DIETRICH,
Petitioners,

v.

SUN EXPLORATION AND PRODUCTION COMPANY a Delaware corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents object to the form and substance of the questions presented in Petitioners' Petition for Writ of Certiorari to the United States Supreme Court (Petition), and believe the questions should be as follows:

1. Was the dismissal of Counts I, III and IV of Petitioners' Amended Complaint—on Respondents' Motion for Summary Judgment Under FRCP 56—in conformity with substantive Michigan law, Michigan being the forum state in this diversity action?

2. Did the District Court abuse its discretion by imposing FRCP 11 sanctions on Petitioners, and their attorney, for pursuing a factually unsubstantiated claim (i.e., Court V of Petitioners' Amended Complaint)?

3. Does due process require the use of a three judge panel to adjudicate "serious" FRCP 11 sanctions?

LIST OF ALL PARTIES

The parties appear in the caption to the case. Sun Energy Partners, a Delaware Limited Partnership, whose units are publicly traded, owns not over 2% of Sun Operating Limited Partnership.

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I. STATEMENT OF THE CASE

A. DISMISSAL OF COUNTS I, III AND IV OF PETITIONERS' AMENDED COMPLAINT

We, address, first, the dismissal—on Respondents' Motion for Summary Judgment—of Counts I, III and IV of Petitioners' Amended Complaint (R.81). Petitioners' Statement of the Case fails to indicate that their claims below were closely related to and dependent upon determinations reached in state court litigation to which Petitioners were not parties. The related litigation was between landowners in the Columbus "3" Oil and Gas Field in St. Clair County, Michigan, the Wronskis and the Koziaras, and Respondents' predecessor in interest, Sun Oil Company ("Sun").

Count I, alleging illegal drainage, is related to *Wronski* v *Sun Oil Company*, 89 Mich App 11; 279 NW2d 564 (1979), *lv den* 407 Mich 863 (1979) ("*Wronski I*"). *Wronski I* involved findings of the state court, vigorously contested by Sun, that Sun had illegally overproduced certain wells in the Columbus "3" Oil and Gas Field resulting in illegal drainage of oil from Tracts 1, 2 and 6 in the field. Petitioners held an overriding royalty interest in Tracts 1, 2 and 6 and it is this interest which gave rise to this litigation.

Counts III and IV grew out of 1974 state administrative proceedings which unitized the Columbus "3" Oil and Gas Field on petition of Sun, pursuant to the Michigan Unitization Law, 1959 PA 197; MCLA 319.351, et seq; MSA 13.139(101), et seq. Dissatisfied with the unit participation percentages assigned to their field tracts, the Wronskis and the Koziaras appealed the Michigan Supervisor of Wells orders un-

itizing the field. This appeal produced *Wronski* v *Sun Oil Company*, 108 Mich App 178; 310 NW2d 321 (1981) (*"Wronski II"*). *Wronski II* resulted in a remand hearing before Michigan Department of Natural Resources, Administrative Law Judge William C. Fulkerson. Administrative Law Judge Fulkerson's Proposal for Decision (A.9)[1] (entirely adverse to Petitioners' claims in Counts III and IV) was sustained by the Michigan Supervisor of Wells and by Ingham County, Michigan, Circuit Judge Carolyn Stell (R.202, Exhibit R-1 thereto). Judge Stell's ruling is now on appeal to the Michigan Court of Appeals, Docket No. 142357. [The case is not before the Michigan Supreme Court as stated on pages 14 and 15 of the Petition.]

The summaries of Counts III and IV appearing in Petitioners' Statement of the Case (Petition, p 2) do not adequately define Petitioners' claims. On page 12 of the Petition, Petitioners rely on the affidavit of Dr. M. Y. Joshi. This affidavit (A.10) shows that the gravamen of Petitioners' case is that an inadequate participation percentage was assigned in the unitization process. For example, the penultimate paragraph 16 of the Joshi affidavit reads:

---

[1] Petitioners' Appendix uses the designation "R" to refer to its appendix documents 1 through 8 instead of the standard "A" designation. Respondents in the instant brief, when referring to Petitioners' appendix documents, use the designation R.1 through R.8. Respondents follow the usual practice of using the "R" designation to cite the Record below. No confusion should arise from such dual use of the "R" designation because neither Petitioners in their Petition or Respondents in the instant opposing brief, refer to or cite R.1 through R.8 of the Record. Respondents' Appendix designates its included documents as A.9 through A.14.

> That Plaintiffs' participation percentage, had Defendants properly represented them, would be far in excess of the approximately 17% they are credited with at present.

Thus, Petitioners' Counts III and IV were an attempt to gain an increased share of the royalties generated by the Columbus "3" Field via an award of monetary damages.

B. DISMISSAL OF COUNT V AND IMPOSITION OF FRCP 11 SANCTIONS

We now address the imposition by the District Court of FRCP 11 sanctions on Petitioners (R.3, Opinion and Order Granting Sanction and R.2, Order Directing Plaintiffs to Pay Sanctions to Defendants). Here, Petitioners' Statement of the Case is both misleading and incomplete.

In Count V of their Amended Complaint, Petitioners sought monetary damages claiming that Respondents' predecessor in interest between November, 1984 and March, 1985 surreptitiously produced 881,071 barrels of oil from the Columbus "3" Field on which it did not pay royalties. Petitioners repeatedly identified November, 1984 through March, 1985 as the pertinent period of the alleged surreptitious production. In a document entitled "Plaintiffs' Claims", dated October 30, 1990, Petitioners averred:

> "Plaintiffs claim that Defendants' records show that 881,071 barrels of oil were *produced in the Columbus III field between November, 1984 and March, 1985* which Defendants did not account for and for which Plaintiffs seek compensation." (Emphasis added, R. 190 Claim, p 2)

In a brief filed by Petitioners, dated May 29, 1991, Petitioners stated:

> "The production records attached to Plaintiffs' Answer to Defendants' Motion for Summary Judgment clearly show that 881,071 barrels of oil *were produced during the relevant period* as alleged in the Complaint." (Emphasis added; R. 198; Plaintiffs' Answer and Brief, p 23)

Finally, Petitioners' attorney, on June 1, 1992, signed the Final Pretrial Order which twice so identified the production period:

> 5. **Issues of fact to be litigated.**
>
> * * *
>
> B. Did Defendants remove oil from the Columbus III field between November, 1984 and March, 1985, which was not properly accounted for?
>
> * * *
>
> 11. **Damages**. Plaintiffs claim that between November, 1984 and March, 1985, Defendants produced 881,071 barrels of oil from the Columbus Field, in which Plaintiffs claim an interest. (R.6, pp 6 and 7)

After numerous postponements, a jury trial on Petitioners' Count V (the only Count which had survived motions for summary judgment) was set to commence on July 2, 1992. On July 1, 1992, Petitioners filed two motions labeled as motions "in limine."[2] The

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[2] Petitioners attempt to justify the tardiness of their actions by stating in the petition:

first motion was entitled "Motion in Limine to Clarify and/or Amend Final Pretrial Order". This motion concluded with the following prayer:

> WHEREFORE, the Plaintiffs request that this court enter an order amending the Final Pretrial Order to properly reflect the Plaintiff's claims or enter such other order as may be appropriate to allow the Plaintiffs to claim that the 881,071 barrels of oil may have been actually produced during time periods *outside* the November, 1984 through March, 1985 time period. (Emphasis added; A.11, p 38a).

On July 2, 1992, the District Court denied both motions. Thereafter, Petitioners' then attorney, Jack C. Chilingirian, conceded to the District Court that Petitioners had no proofs to substantiate their claim:

> THE COURT: Okay. Well, it's clear then, however, that you're unable to present any proofs that the—that the oil was removed surreptitiously, or otherwise, by the

---

> The Final Pretrial Order did not set the date of trial, but the Court had assured both sides that several weeks' notice would be given to the parties and counsel. (Petition, p 3).

However, Paragraph IX of the April 14, 1992 Final Pretrial Order reads:

> IX. Trial will be held in trial term beginning 7/1/92. The Court utilizes a trailing trial docket. (A-7, p 2)

Furthermore, Respondents do not agree that the District Court promised the parties "several weeks" of notice of the exact trial date.

> Defendant, with no compensation paid to the Plaintiffs during the period November 1984 through March of 1985, is that correct?
>
> MR. CHILINGIRIAN: That's correct, your Honor.

Thereafter Petitioners' oral motion for adjournment was denied and Count V was dismissed (R.4).

On Respondents' motion, and following Petitioners' answer, Petitioners were sanctioned for pursuing a factually unsubstantiated claim (R.3, pp 1, 2 and 11; A.13 and A.14). The sanctions imposed, $19,735, represented Respondents' costs incurred in defending Count V from February, 1992 (when all Counts except Count V were dismissed) until July 2, 1992 (the day of trial) (R.1, p 29). Such $19,735 was assessed in equal shares on Petitioners and on Petitioners' then attorney, Jack C. Chilingirian (R.2, p 2).

Petitioners do not seek review of the dismissal of their Count V.

II. SUMMARY OF ARGUMENT

Respondents seek a Writ of Certiorari claiming that the rulings below call for an exercise of the Supreme Court's power of supervision. However, there is no need for exercise of such power; the issues raised by Petitioners are not of special importance such that review by this Court is required.

Jurisdiction is based on diversity. Dismissal, on Respondents' Motion for Summary Judgment pursuant to FRCP 56, of Counts I, III and IV of Petitioners' Amended Complaint, was clearly consistent with applicable Michigan law. Petitioners, relying

on *Wronski I*, proposed to use offensive collateral estoppel in lieu of proofs to support their Count I. Both the District Court and the Sixth Circuit Court of Appeals properly found that the facts determined in *Wronski I* were not sufficiently similar to the facts which Petitioners would have to prove in order to prevail on Count I. As to Counts III and IV, the District Court and the Sixth Circuit properly found that collateral estoppel precluded relitigation of the issues decided adversely to Petitioners in the unitization hearings and in the *Wronski II* remand hearing.

The FRCP 11 sanctions imposed by the District Court were not an abuse of discretion. Petitioners offered no evidence showing any investigation (let alone reasonable investigation) of the merits of their now discarded Count V. The procedures before the District Court complied with due process.

III. ARGUMENT

A. NO ISSUE RAISED BY THE PETITIONERS IS OF SUCH A NATURE OR IMPORTANCE THAT THIS COURT'S INTERVENTION IS MERITED.

Rule 10 of the Supreme Court's Rules set forth the character of reasons that this Court considers in reviewing petitions for writs of certiorari. The Petition has failed to present any issue or argument that is even close to meeting the level of significance required to merit this Court's review. In contesting the dismissal of their Counts I, II and IV of their Amended Complaint, Petitioners are merely pursuing unsuccessful attempts to increase their royalty payments from an oil field in which they own an interest.

This aspect of the Petition is entirely controlled by state law. In contesting sanctions entered against them under FRCP 11, Petitioners are merely attempting to avoid payment of a $9,867.50 sanction. None of the rulings of which Petitioners seek review are in conflict with a decision of another United States Court of Appeals or involve important questions of federal law. Rather, Petitioners simply disagree with the judgment and discretion exercised by the District Court and sustained by the Court of Appeals. Accordingly, this Court should deny the Petition on the grounds that the type and character of the issues raised are not of special importance.

B. THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS BOTH CORRECTLY HELD THAT SUMMARY JUDGMENT DISMISSING PETITIONERS' COUNT I WAS PROPER BECAUSE PETITIONERS–FOR THEIR PROOFS–RELIED SOLELY ON COLLATERAL ESTOPPEL AND SUCH RELIANCE WAS INSUFFICIENT SUPPORT OF THEIR COUNT I CLAIM.

Petitioners claim that the findings and opinion of St. Clair County, Michigan Circuit Court Judge Halford I. Streeter–sustained but modified as to damages in *Wronski I*–establishes that a genuine issue of material fact existed in Count I and therefore, granting of Respondents' Motion for Summary Judgment on Count I was in error.

Petitioners' argument fails to advise this Supreme Court of the legal basis of the District Court's dismissal of Count I. Below the Petitioners had relied exclusively on the doctrine of collateral estoppel to establish their factual allegations in Count I and offered no proof to support their claim other than factual findings in *Wronski I*. District Judge Gadola

found that the factual findings of *Wronski I* were clearly insufficient proof of Petitioners' Count I claim:

> Defendants claim that plaintiffs cannot prove that Sun Oil drained 36,417.5 barrels of oil from Tracts 1, 2 and 6. Defendants point to a lack of expert testimony and to the time and property interest discrepancies between *Wronski I* and the instant case. Plaintiffs state that expert testimony is not necessary to show defendants' wrongdoing and that *Wronski I* is sufficiently similar to the facts in this case to allow the use of offensive collateral estoppel. This court agrees that plaintiffs' experts and the expert testimony used in the Streeter Opinion are insufficient to establish defendants' alleged illegal drainage of oil from Tracts 1, 2 and 6. The use of *Wronski I* in this case is limited because of the time and property interest discrepancies. (R.8, p 11)

The Sixth Circuit Court of Appeals thoroughly reviewed the District Court's ruling and likewise found the factual findings of *Wronski I* fell far short of establishing Petitioners' Count I claim:

> *Wronski I* is conclusive on the finding of the illegal drainage occurring between February 1, 1970 and June 30, 1974; but the parties did not litigate, and the judgment does not establish, the amount of oil drained illegally during November 1, 1971 and June 30, 1974. *Wronski I* also does not establish that a steady stream was pumped from the field, the percentage pumped during any subperiod

> of time within the relevant time frame, or the value of oil drained during any subperiod. Thus, *Wronski I* cannot be used as the plaintiffs' only evidence of the amount of oil drained from the property between November 1, 1971 and June 30, 1974.
>
> Plaintiff have failed to respond to the problem of lack of identity of issues actually litigated, continuing to argue on appeal that no additional evidence is necessary. Without such additional evidence, plaintiffs cannot prove Count I. (R.1, pp 8-9)

In affirming the District Court, the Sixth Circuit properly cited Michigan law which holds that the doctrine of collateral estoppel cannot be invoked in subsequent actions as to issues not "actually litigated" in the first action. See *Knoblauch* v *Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987) and *Howell* v *Vito's Trucking Co*, 386 Mich 37, 41-42; 191 NW2d 313 (1971). (R.1, p 8). Because there was no identity of issues, the decisions of the District Court and the Sixth Circuit Court of Appeals were clearly correct.

Finally, the District Court's dismissal of Count I should be affirmed because Michigan law does not permit the offensive use of collateral estoppel. Petitioners and their predecessors in interest were not parties to *Wronski I*. Thus, Petitioners—because they were "plaintiffs-strangers" to *Wronski I*—were attempting to use collateral estoppel offensively. The Michigan Supreme Court in *Howell* v *Vito's Trucking Co*, *supra*, addressed a like attempt to use offensive collateral estoppel by a non-party and ruled the same could not be done. In *Knoblauch* v *Kenyon*, *supra*,

the Michigan Court of Appeals summarized this ruling of the Michigan Supreme Court:

> The court (in *Howell* v *Vito's Trucking Co.*) completely foreclosed the offensive use of collateral estoppel absent identical parties or their privities in successive civil suits . . ., 163 Mich App, 720. (Parenthetical expression added.)

Dismissal of Petitioners' Count I was fully consistent with and was required by Michigan law.

C. RELITIGATION OF THE ISSUES PRESENTED BY PETITIONERS' COUNTS III AND IV WAS PRECLUDED BY DEFENSIVE COLLATERAL ESTOPPEL.

Petitioners claim that the application of collateral estoppel to preclude relitigation of the issues raised in their Counts III and IV was improper because the remand hearing which developed out of *Wronski II* is now on appeal and, thus, is not a final determination.

The doctrine of collateral estoppel was properly applied for two separate reasons. First, Petitioners and their predecessors in interest are bound by the 1974 state administrative orders unitizing the Columbus "3" Field and establishing each interest-owners' participation percentage in the unitized field (A.12). Secondly, and independent of the foregoing, Petitioner Edgar J. Dietrich and his law firm were counsel for the Koziaras in the remand hearing and, thus, Petitioners are bound by the results of that hearing.

1. Collateral Estoppel was based on the Michigan Unitization Law and the Michigan Supervisor of Wells orders unitizing the Columbus "3" Oil and Gas Field.

In 1973, Sun, Respondents' predecessor in interest, petitioned the Supervisor of Wells, Michigan Department of Natural Resources, to unitize the Columbus "3" Field pursuant to the Michigan Unitization Law. The purpose of the unit was to enhance the recovery of oil through secondary operations by pressure maintenance.

> Unitization is a process which permits an entire field to be operated as a single entity without regard to surface boundary lines. When a field is unitized the owners of property within the drilling range are awarded a royalty interest on the whole of what is produced. *Wronski II*, p 178.[3]

The Michigan Unitization Law contains numerous and rigorous safeguards to protect interested parties such as Petitioners. For example, Section 5 requires that notice be given to all interested parties and a hearing be held before the Supervisor. The hearing is governed by Chapter 4 of the Michigan Administrative Procedures Act, 1969 PA 306; MCL 24.201 et seq; MSA 3.560 (101) et seq. Further, Subsection 4 of Section 5 and Section 6 set forth a series of specific findings of fact which must be made by the Supervisor as a prerequisite to issuing an order for unitization of a field. See Section 6(c), which requires, in effect, that the Supervisor find the tract partici-

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[3] For additional description of unitization and its legal ramifications, see *Amoco Production Co* v *Heimann*, 904 F2d 1405, 1410-1411 (10th Cir. 1990).

pation percentages to be fair, reasonable and equitable. Also, Section 7 then required that the plan for unit operations be approved in writing by 75% of each group of interested parties (this requirement has since been modified). Subsection 4 of Section 5 requires that the Supervisor consult with the Oil and Gas Advisory Board before issuing his order of unitization. Sections 30 through 35, inclusive, provide that aggrieved parties may take an appeal to the Appeal Board and present written and oral arguments. Pursuant to Section 35, the Appeal Board may affirm or reverse the order or remand the same with recommendations. Finally, Section 36 provides for judicial review. Judicial review is governed by Chapter 6 of the Michigan Administrative Procedures Act, MCL 24.301 et seq, MSA 3.560(201) et seq.

Following the procedures outlined above, the Columbus "3" Field was unitized effective June 30, 1974 and Sun became the unit operator (A.12)

The unitization orders recite that due notice was given (A.12, pp 39a, 43a and 44a). Petitioners do not claim lack of due notice, but did not participate in the unitization hearings (R.33, Request 29).

The doctrine of collateral estoppel applies, in Michigan, to administrative determinations such as those that resulted in the unitization of the Columbus "3" Oil and Gas Field.

> It is established law in this state that the doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature, where a method of appeal is provided, and where it is clear that it was the legislative intention

> to make the determination final in the absence of an appeal. *Senior Accountants* v *Detroit*, 399 Mich 449, 457-458; 249 NW2d 121 (1976).

See also *Nummer* v *Dep't of Treasury*, 200 Mich App 698; 504 NW2d 724 (1993).

For these reasons, the rulings by the District Court and the Sixth Circuit Court of Appeals that Petitioners were bound by the unitization order and could not relitigate the participation percentages assigned to Tracts 1, 2 and 6, are entirely correct (R.1, pp 9-17 and R.8, p 24).

Also, the rulings below are entirely consistent with a series of Court of Appeals diversity cases, all holding that a party whose rights are affected by the orders of a state agency—such as the Michigan Supervisor of Wells—is estopped from obtaining relief inconsistent with the agency orders.

Amoco Production Co v *Heimann*, 904 F2d 1405 (10th Cir. 1990), similar to Petitioners' Count III, addressed Heimann's claim that an oil company had breached its "good faith" duty in connection with a unit formed to produce carbon dioxide. In this case, the landowners, the Heimanns, had consented in their lease with Amoco to formation of the unit.[4] The unit had been formed pursuant to procedures before the New Mexico Oil Conservation Commission similar to the Michigan Unitization Law discussed above. The Tenth Circuit Court of Appeals reversed a district

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[4] The Heimanns had obtained a rehearing before the New Mexico Commission and had litigated the unit before the New Mexico courts, 904 F2d at 1418.

court opinion holding the unitization of the Heimann lands void. The Tenth Circuit ruled:

> Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of unitization plan and entitled to full faith and credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. 904 F2d at 1414.

The Tenth Circuit concluded that the Heimanns were estopped from collaterally attacking the unitization order.

Katter v *Arkansas Louisiana Gas Co*, 765 F2d 730 (8th Cir. 1985) shows that the proceedings by the state regulatory agencies are *in rem* and that interested parties, like Petitioners, who fail to participate in the state agencies are precluded from a collateral attack. In this case the landowners, the Katters, were in Lebanon during the state agency proceedings. Notice was sent to the Katters in care of the American Embassy in Lebanon, which notice the Katters denied receiving. A second notice was sent to the Embassy advising the Katters of their two options upon the formation of the unit. This second notice was received by the Katters but the Katters did not respond in a timely manner, resulting in the first option of two options being "assumed" to be elected by the Katters. 765 F2d at 732. The Katters did not attempt to set aside the unit but sought money damages (as under the circumstances the second option would have been more beneficial), as do Petitioners in this case. The Eighth Circuit reviewed the applicable Arkansas statute and concluded:

> Clearly the Arkansas legislature intended an adjudicatory, *in rem* order which, when final, would have all the force and effect of a court judgment; and in fact required and provided for all things necessary to give it that effect. In general, then, such an order would fix the party's rights and duties as fully and finally as a court judgment—*albeit here a default judgment*[5]—and should be entitled to the same full faith and credit and preclusive effect. 765 F2d at 734. (Emphasis added; Citations omitted).

A like result was reached in *Trahan* v *Superior Oil Company*, 700 F2d 1004 (5th Cir. 1983). The Trahans sought cancellation of an oil and gas lease on their property or damages on account of drainage. The Trahans claimed that Superior Oil Company had knowledge that the productive formation extended into their lands but failed to include the lands in an offsetting unit approved by the Louisiana Commission for the Greene Well. Similar to *Amoco* and *Katter*, the Trahans were precluded from litigating their claim as the same constituted an impermissible attack on the order of the state commissioner. 700 F2d at 1025.

The Fifth Circuit Court addressed and dismissed the Trahans' claim that they were not making a col-

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[5] Under Michigan collateral estoppel principles, a default judgment is just as conclusive as adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following a full evidentiary contest. *Perry & Derrick Company, Inc* v *King*, 24 Mich App 616; 180 NW2d 483 (1970); *Rohe Scientific Corp* v *NBD*, 133 Mich App 462, 467; 350 NW2d 280 (1984).

lateral attack on the commission order because they were seeking money damages and not attempting to set aside or to modify the order. The Fifth Circuit ruled that the prohibition against collateral attack was not so restricted:

> Rather, the rule also extends to suits between private parties in which a particular order of the Commissioner is an operative fact upon which the determination of the parties respective rights directly depends, even though all relief sought can be given, such as by money damages or lease cancellation, without thereby causing any actual violation of the Commissioner's order. 700 F2d at 1015 and 1016.

Thus, it is irrelevant that an award of money damages—as sought by Petitioners—may not have a direct effect on a unitization order. Rather, collateral estoppel attaches to a unitization order to bar the relitigation of issues.

For additional case authority holding that orders of oil and gas boards or commissions are not subject to collateral attack, see *Mize* v *Exxon Corporation*, 640 F2d 637 (5th Cir. 1981) and cases cited therein at page 640.

2. Application of Collateral Estoppel was also required because of Petitioner Edgar J. Dietrich's participation as counsel for the Koziaras in the Remand Hearing before Administrative Law Judge Fulkerson.

Respondents emphasize that Petitioner Edgar J. Dietrich personally and through his law firm represented the landowners Koziaras throughout the *Wronski II* remand hearings (R.33, Requests 58 and 59),

the results of which are now on appeal before the Michigan Court of Appeals. As stated by the Sixth Circuit Court of Appeals, all aspects of Counts III and IV were addressed and conclusively determined by Administrative Law Judge Fulkerson's Proposal for Decision (A.1, pp 16-17). As a result, under Michigan law, Respondents are estopped from relitigating those issues.

As developed above, *Howell* v *Vito's Trucking Co*, *supra*, 386 Mich 37; 191 NW2d 313 (1971) prohibits offensive collateral estoppel absent mutuality. *Howell* also shows that Michigan does permit, under certain circumstances, defensive collateral estoppel absent mutuality. The following appears at footnote 7, page 47:

> As observed by the commentator in 31 ALR 3d 1044 at 1072, "The courts are more inclined to permit the defensive than the offensive, use of the doctrine of collateral estoppel." In line with this general authority, see our Court's comments and holding in *Walz* v *Reliance Insurance Co. of Philadelphia* (1922), 221 Mich 345, quoted with approval in *DePolo* v *Greig*, *supra*, at 712.

In *DePolo* v *Greig*, 338 Mich 703, 709-713; 62 NW2d 441 (1954), the Michigan Supreme Court allowed the president and the principal stockholder of a corporation to plead defense collateral estoppel, based on a prior action brought by the same plaintiff against the corporation wherein the corporation had been exonerated.

In *Halvorsen* v *Grain Dealers Mutual Insurance Co*, 210 F Supp 73 (W.D. Mich 1962), Phyllis Jones had

won a judgment against Reva Halvorsen for injury suffered in an automobile accident. Thereafter, Reva Halvorsen sued Edward Jones, father of Phyllis and owner of the vehicle which Phyllis was driving. Edward Jones was allowed to plead defensive collateral estoppel based on the former adjudication which exonerated his daughter Phyllis of negligence.

There are a series of Michigan cases holding that defensive collateral estoppel can apply, absent mutuality, in attorney malpractice cases. See *Alterman* v *Provizer*, 195 Mich App 422; 491 NW2d 868 (1992)—cited by the Sixth Circuit Court of Appeals (R.1, p 14)—and the cases cited therein. In *Alterman*, the attorney had advised his client to settle a work related injury. Later and with a new attorney, the employee sought to set the settlement aside claiming mental incompetency. The following court proceedings found that the employee was competent and upheld the settlement. The employee then sued his first attorney for malpractice for settling the claim while the employee was incompetent. The Court of Appeals allowed the defendant attorney to invoke defensive collateral estoppel despite the absence of mutuality. See also *Knoblauch* v *Kenyon*, *supra*.

In effect, Respondents—after having participated as counsel for the Koziaras in the remand hearings and being dissatisfied with the outcome of that proceeding—sought to relitigate the issues in this action.

Admittedly, the Fulkerson Proposal for Decision is now on appeal before the Michigan Court of Appeals. However, it has not been set aside, modified, or remanded for further proceedings. Under Section 106 of the Michigan Administrative Procedures Act, agency findings of fact are conclusive if supported by

competent, material and substantive evidence on the whole record, *Halm* v *Board of Education of Dansville Agriculture Schools*, 174 Mich App 520; 436 NW2d 680 (1988).

Michigan case authority clearly demonstrates that an order pending on appeal nevertheless has preclusive effect:

> The rule in Michigan is that a judgment pending on appeal is deemed *res judicata.*[6] *City of Troy* v *Hershberger*, 27 Mich App 123, 127; 138 NW2d 420 (1970).

Petitioners cite no contrary authority to support its position that a party may proceed to trial and relitigate precluded issues because there is a pending appeal of the administrative hearing where the precluded issues were first addressed.

Dismissal of Counts III and IV, likewise, was fully consistent with and was required by Michigan law.

D. THE FRCP 11 SANCTIONS IMPOSED WERE NOT AN ABUSE OF DISCRETION.

Petitioners cite FRCP 54 and argue that the sanctions were an abuse of discretion because of a reasonable belief that their motion to amend or clarify their pleadings would be granted. No factual basis for

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[6] *City of Troy* v *Hershberger* predates *Howell* v *Vito's Trucking Co*, *supra*, wherein the Michigan Supreme Court first clearly distinguished the related doctrines of res judicata and collateral estoppel. See 386 Mich at 41-42. The Michigan Court of Appeals in *City of Troy* used the term "res judicata", but at page 127 cited a "rule" which encompasses both concepts. Accordingly, the above quotation applies equally to the doctrine of collateral estoppel.

such alleged reasonable belief is given and FRCP 54 is not germane. As shown above in Respondents' Statement of the Case, Petitioners sought to amend the Joint Pretrial Statement, not their pleadings.

Such amendments are governed by FRCP 16(e), reading:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Petitioners, likewise, offer no factual basis to support a claim that amendment to the Joint Pretrial Statement was required to prevent manifest injustice.

Petitioners claim:

> Appellant's [sic] counsel attempted to rectify *a technical defect* by filing a motion to amend to broaden the specified time period within which Appellants [sic] reasonably and objectively believed that Appellees [sic] wrongfully produced oil. (Petition, p 20)

Contrary to Petitioners' characterization in their Petition, the motion was not so viewed by Respondents, by the District Court, or by the Sixth Circuit Court of Appeals as a mere attempt to remedy a technical defect. Petitioners sought to enlarge the time period during which the unlawful activity was alleged to have occurred from a precise and definite time period of between November, 1984 and March,

1985 to an expansive and unspecified period. The District Court commented:

> Further, the tactic of plaintiff in filing their motion on the eve of trial to state an entirely different claim than they had been asserting since the filing of their amended complaint of April 11, 1988, was reprehensible and unacceptable. Viewing this motion against the backdrop of the history of this case, this court can only surmise that it was intended to either be a surprise tactic or at least a delay tactic. Therefore, this court did not allow plaintiffs' amendment on the morning of trial, with a jury having been selected and ready to hear the case, because it would have worked substantial injustice upon defendants who have adequately prepared for trial over the five years this case had been pending, on the basis that they were defending a claim of oil allegedly taken without compensation between November 1984 and March 1985. This would have presented defendants with the prospect of defending against an entirely different claim, with possibly different defenses, including, as defendants counsel correctly pointed out in oral argument on July 2, 1992, the defense of the statute of limitations. (R.4, p 10)

The Sixth Circuit Court of Appeals commented:

> As such, this was not a "technical defect" of which plaintiffs were unaware. Plaintiffs have established absolutely no abuse of dis-

> cretion on the part of the district court in imposing these sanctions. In fact, the record reflects that this is exactly the type of case for which Rule 11 sanctions are appropriate. (R.1, p 29)

Petitioners' arguments fail to address the fact that sanctions were imposed for pursuit of a factually unsubstantiated claim. FRCP 11 reads, in part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed *after reasonable inquiry it is well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis supplied)

Petitioners do not now offer, and did not offer below, any exculpatory evidence showing reasonable investigation of the now discarded claim that surreptitious oil production occurred between November 1984 and March 1985. More to the point, Petitioners do not undertake to explain why they knew on the first day of trial (July 2, 1992) that they had no proofs, but for the 5-1/2 years that the claim was previously pending were unaware of such lack of proofs. See Petitioners' Answer to Motion for FRCP 11 Sanctions and Brief in Support of Answer to Motion (A.14).

E. THE ADMINISTRATION OF FRCP 11 SANCTIONS IN THIS CASE COMPLIED WITH DUE PROCESS.

Petitioners conclude with a policy argument based on a perceived prejudice which they claim is inherent when the presiding trial judge rules on a motion for sanctions. Petitioners suggest, in "serious cases" (a sanction of $2,500 or more), that use of a three judge panel is necessary to avoid such perceived inherent prejudice and any appearance of unfairness.

The history of this case renders Petitioners' plea for more due process a bit hollow. In addition to the fully justified FRCP 11 sanctions, Petitioners were also sanctioned below for obstruction of discovery. The factual history leading to these discovery sanctions is outlined in the District Court Opinion and Order Granting Sanctions (R.3, pp 3 - 5) and begins:

> The history of this case would not be complete without an overview of the extreme litigiousness and delay that has occurred because of the actions of plaintiffs and plaintiffs' counsel.

Petitioners do not address the requirements of due process applicable in FRCP 11 proceedings based on *Mathews* v *Eldridge*, 424 U.S. 319; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976) and addressed in *Donaldson* v *Clark*, 819 F2d 1551 (11th Cir, 1987). In fact, Petitioners did not, before the District Court, request a hearing, but rested on their Answer to Motion for FRCP 11 Sanctions (A.14). Furthermore, as shown above, Petitioners did not offer evidence of due investigation into the merits of Count V. Nor did Petitioners raise this due process issue before the Sixth Circuit Court of Appeals. Rather, Petitioners

raised frivolous technical objections (i.e., lack of jurisdiction and lack of a continuing obligation to review each pleading or paper filed) and attempted to relitigate the District Court's findings (R.3, pp 6 and 7). Accordingly, the Petitioners possess no right to seek "review" of this due process issue at this late date.

Overlooking the above, Petitioners' suggestion of a three judge panel, even if otherwise authorized, runs counter to the established practice in FRCP 11 proceedings. Use of three judge panels would increase the use of the judicial system and the fiscal and administrative burdens. This Supreme Court, in *Mathews*, and the Eleventh Circuit Court of Appeals in *Donaldson* have both acknowledged that the procedural safeguards to be afforded must be weighed against the resulting costs. See *Mathews*, 429 U.S. at 335 and the similar statement in *Donaldson*:

> The specific dictates of due process will be determined by the interaction of several factors. These factors include but are not limited to: the interests of attorneys and parties in having a specific sanction imposed only when justified; the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in efficiently monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedure requirements would entail. (819 F2d at 1558)

Finally, we should comment that in a truly serious case the criminal contempt procedures of Rule 42(b) of the Rules of Criminal Procedure may be applicable. The *Donaldson* Court stated:

It is not necessary to follow the procedures required in criminal contempt proceedings in every case to insure that the imposition of a monetary sanction is justified; less extensive procedures will generally protest the individual interests involved without undermining Rule 11. (819 F2d at 1559)

IV. CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Dated: August 29, 1994

APPENDIX

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Affidavit of Dr. M.Y. Joshi	R.76	A.10	32a
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Reports (2) of the Michigan Supervisor of Wells Unitizing the Columbus "3" Oil and Gas Field, being Attachments O and T to Defendants' Request for Admissions	R.17	A.12	39a

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STATE OF MICHIGAN

Before the Department of Natural Resources

In Re: Koziaras v Sun Oil Company

Proposal for Decision

William C . Fulkerson
Administrative Law Judge

This matter, is before the Supervisor of Wells pursuant to the Order of the Ingham County Circuit Court. The hearing was conducted pursuant to The Michigan Unitization Act, 197 PA 1959, as amended. The parties to the hearing were the Koziaras and Sun Oil Company. At the time of the remand Patrick Petroleum Company and the Wronskis were parties to the proceeding who subsequently reached a settlement and did not participate in the hearing. The hearing record is in two phases. The first is the record of proceedings before the Supervisor of Wells at the May 15, 1973, and subsequent hearings which culminated in the Order of Supervisor of June 25, 1974 (effective June 30, 1974). The second phase is the appeal of the Wronskis and Koziara of the Supervisors Order which culminated in a nine-day hearing.

Historical Background

The Koziaras own an interest in and Sun Oil Company is the operator of the Columbus #3 field. The Columbus #3 field is approximately two and one-half miles long and one-half mile wide located in Sections 3 and 10 of Columbus Township and Section 34 of Wales Township, St. Clair County, Michigan. The field was discovered in November of 1968. A total of 39 wells were drilled during the development of the field. Sixteen of those wells were dry and unproductive. Twenty-three were productive of gas and oil. The Columbus #3 pool is a Salina-Niagaran reservoir. The productive reservoir is a reef which was part

of an ancient sea. The wells are productive of both gas and oil from the Brown Niagaran. The productive interval is at a depth of approximately 3,000 feet below the surface.

In March of 1973, Sun Oil Company petitioned the Supervisor of Wells for the unitization of the Columbus #3 field. The Unitization Proposal was that all produced gas would be reinjected into the producing formation together with some additional water. The purpose of the reinjection is to maintain reservoir pressure and energy allowing for a greater percentage of recovery of oil and gas in place.

The unit operations would convert some producing wells to injectors where gas or water would be reinjected to the producing formation. Other producing wells would be allowed to produce at a higher rate than currently allowable. Oil that is recoverable by conventional means through pumpage or natural flow on each drilling unit is called Primary Production. The proposal of Sun Oil Company was for secondary recovery or enhanced oil recovery. According to Sun's calculations, an additional 2.3 million barrels of oil would be recovered by engaging in enhanced oil recovery. As previously stated, in order to enhance recovery there must be some form of pressure maintenance or increase in reservoir energy to force an incremental amount of oil out of the reservoir. When this is done the field can no longer be operated as it was in the past with each landowner having a well on their own tract. Some of the wells will be produced, others will be converted to injectors. Additional gas or water would be injected into the Salina-Niagara Group reservoir rocks for pressure maintenance. The tracts with injector wells would no longer produce gas or oil. In order to accomplish secondary recovery it is necessary to reach an agreement among the various owners as to how the benefits and burdens of this different operation will be shared. The typical method for conducting these types of operations is for the operators to meet and propose a plan for the unitized operation of the field. Of particular importance to the agreement for

unitization is the determination of a participation formula. This formula determines how the proceeds of unit production and the corresponding expenses shall be allocated to the various tracts. Upon the execution of an agreement for unitized operations and a plan for unitization by requisite percentage of working interest and royalty owners, a plan may be submitted to the Supervisor of Wells who has the power to order the implementation of the unit and join non-consenting interests into the plan.

On May 15, 1973, the Supervisor of Wells conducted a hearing to review the technical feasibility of Sun's proposal for unitization and secondary recovery from the Columbus #3 pool. Part of the hearing related to the fairness of the participation formula to which non-consenting owners would be subjected. At that time Sun Oil Company did not have the requisite percentage of royalty interests to invoke the power of the Supervisor to join the non-consenting interest. Therefore, a supplementary hearing was scheduled limited to the issue of the percentage of consents, culminating in a June 25, 1974 Order of the Supervisor of Wells. This Order adopted the plan of unitization, found the proposal feasible, and in compliance with the various statutory criteria for unitization and ordered the unit effective June 30, 1974. The unit has operated since that date. Following the hearing both Mr. Wronski and Mr. Koziara appealed the Order of the Supervisor pursuant to the Michigan Unitization Act.

Over the next several years Circuit Court litigation ensued between the parties to this proceeding. This litigation resulted in a determination by the St. Clair County Circuit Court, and ultimately substantially adopted by the Michigan Court of Appeals, that Sun Oil Company had systematically over-produced certain wells in the Columbus #3 field to the detriment of the plaintiffs and awarded damages accordingly. This case is now on remand from the Ingham County Circuit Court with the Supervisor obli-

gated to make findings as expressed in the Court's Order as follows:

> 3. Upon the completion of such procedures, the Supervisor of Wells shall promptly file with this Court and serve on the parties a report containing findings of fact as to:
>
> (a) The extent, if any, to which any well in the Columbus "3" Salina-Niagaran Formation Pool was, in the months of October, November and December, 1971, produced in excess of the daily oil allowable per producing well as specified in the Department of Natural Resources, Supervisor of Wells, February 1, 1970 Proration Order, and in violation of the applicable rules, regulations and approved practices governing production of oil fields subject to proration.
>
> (b) The participation percentages allocated to Plaintiff Wronskis' Tract No. 7 and to Plaintiff Koziaras' Tract No. 6 pursuant to the formula contained in Article 5, *Tract Participations*, of the Columbus "3" Unit Agreement if the overproduction, if any, found pursuant to subparagraph (a) is excluded in the application of such formula.
>
> (c) Any other matter which plaintiffs or defendants demonstrate is relevant to establishment of royalty percentages to which plaintiffs and/or defendants are entitled. Any "other matter" set forth herein shall include the matter,s set forth in the Offer of Proof attached as Exhibit I to Plaintiffs Wronskis' Motion and Affidavit in support thereof dated February 4, 1983, and filed in this case and such similar, type proofs as may be offered on behalf of the Plaintiffs Koziara. Defendants Sun

Oil Company and Patrick Petroleum Company may submit relevant proofs in opposition to such matters submitted by Plaintiffs.

In the preparation of this Proposal for Decision, I have reviewed the record of the original hearing, all Exhibits, and testimony from the second hearing, including all briefs and writings filed by the parties.

FINDINGS OF FACT

Fourth Quarter 1971 Production

The unitized operation of a field for oil and gas results in commingling of the oil from the various tracts of land which make up the unitized area. It is necessary to arrive at a formula for distribution of produced products that will allocate to each separately owned tract their fair and equitable share of the proceeds. The participation formula selected for the Columbus #3 unit has two components. The first component of the formula was that each tract was to be given credit for the production from their wells for a given period of time, specifically, the fourth quarter of 1971, divided by the total production of the field for that period of time. The second component of the formula is oil and gas porosity acre feet for each tract divided by the total porosity acre feet for the entire field. Within the porosity acre of feet calculations a weighted formula was used giving greater value to oil porosity feet than gas porosity feet as a reflection of the disparity in value between the two products. The formula then gave credit 60% to the production phase, 40% to the porosity acre of feet portion.

At the time the unitization was ordered the Columbus #3 field was a prorated field. This means that allowable production rates were established for the wells to preserve reservoir energy and gain the maximum oil recovery from the reservoir. By a proration order the maximum amount of oil and/or gas to be produced by each well was estab-

lished. The limit established by the Supervisor of Wells Order of January 27, 1970, was 75 barrels of oil and/or 100,000 cubic feet of gas. The allowable production rates for each individual well were established by gas/oil ratio tests. For example, a well that would produce 100,000 cubic feet of gas and 10 barrels of oil per day would not be allowed to produce more than the 10 barrels of oil per day.

A well that could produce 75 barrels of oil and only 10,000 cubic feet of gas would not be allowed to produce any more than the amount of gas that came along with 75 barrels of oil. At the time of the unitization the gas from the field was being flared. This means that the gas was burned. According to the testimony of Sun's witnesses at the original hearing the field only produced about 500,000 cubic feet of gas per day of which about 100,000 cubic feet was used to operate lease equipment. They estimated a capital expenditure of $165,000 would be necessary to market the gas. Therefore, on the basis of the uneconomical gas production, the operators were allowed to flare their gas in the field.

The St. Clair County Court in the litigation between the parties found that the Sun Oil Company had produced several of their wells at greater than the allowed 75 barrels per day rate to make up for wells that were poor producers. The resultant excess production was then assigned back to the poor producers as though the proration order had not been violated. The Court found that the wells had been overproduced in the time period between February 1, 1970, and June 30, 1974. The Court found a specific amount of oil that was overproduced. The Court further found that false records were filed by Sun Oil during that same period of time. It is my opinion that the parties are bound by the findings of Judge Streeter in the St. Clair County Opinion.

Plaintiff Koziara has urged from the start of the proceeding that if production is to be a component of the formula, then we must remove the illegal oil from the overproduced leases and add that oil to the Koziara's properties. According to the testimony of Mr. Lorenz, a Geology witness for plaintiff, 2,061 barrels of oil should be added to the Koziara's tracts. He then would subtract the 2,061 barrels from the Winn lease. This approach divides the illegally produced oil by the number, of quarters and then allocates it to a given quarter. The then derived overproduction would be added to Koziara's lease and subtracted from the overproduced lease. These new figures would then be incorporated into the participation formula yielding a new participation formula for the tracts involved.

There are a number of reasons why this simplistic approach is inappropriate. The first and most compelling reason is that the St. Clair County Circuit Court did not allocate any amount of overproduction to any specific time period within the three plus years that the Court found overproduction. If the overproduction were added to the production credited for the fourth quarter of 1971 then the Koziara wells would be overproduced by 13% over the established allowable. The reason that current production is incorporated into an allocation formula is that it is reflective of the wells current capabilities for production. Since the Koziara wells were produced very near their allowable it would be an unfair advantage over all other tracts to credit a production amount greater than that allowed by the proration order. It is my opinion that an approach such as that suggested by plaintiff Koziara is entirely artificial and has no relationship to the productive capability of the wells. If the formula were based on cumulative production, the addition of overproduced oil might be appropriate. However, this approach too is unfair in that all tracts within the unit would have had to have a

similar opportunity to overproduce so their cumulative oil could be larger.

I have reviewed all of the production records and various exhibits relating to the production from wells during the fourth quarter of 1971. I find that the gas/oil ratio test establishing the production levels for each well are reliable. The St. Clair County Circuit Court based their determination of overproduction on gas/oil ratios. There were no findings by the St. Clair County Court that the gas/oil ratios were unreliable and they were used by the Court to calculate overproduction. The allowables were set by this Agency following an Administrative Hearing. This Agency is mandated to prevent waste and to allow each operator in the pool to produce their fair and equitable share. The gas/oil ratio tests determine the amount of oil and gas that can be produced without waste of reservoir energy.

The allowable production for all wells in the Columbus #3 field for the fourth quarter of 1971 was 102,844 barrels of oil. The reported production used in the participation formula for the same period of time was 101,793 barrels of oil. The actual production figures are very near the allowable production level. If allowable production levels were substituted for the production records, the difference would be negligible. In the case of the Koziara interest it would cause a decrease in their percentage of the fields production. I, therefore, conclude that the production figures used are reflective of the capability of the individual wells and represent the fair and equitable share of reservoir energy and products. The production figures reported by Sun Oil during the fourth quarter of 1971 appear to be reflective of the individual wells capability. These records reflect no illegal overproduction. They do reflect that permission was granted for wells including the Koziara wells to make up production lost as a result of a pipeline blockage. The records show that four wells did poorly as expected, the good wells performed well and

that certain wells were shut in during that period of time. It is my opinion that the production figures used in the participation formula are in fact representative of the capabilities of the well and closely parallel the amounts set as production allowables for the wells. I therefore find that the overproduction found by the St. Clair County Court does not require an adjustment or the percentage attributable to the Koziara tracts on the basis of production. If it does require an adjustment, it is negligible and I would suggest in the alternative that the percentages derived from field proration allowables be used in its place. If this were the case, Mr. Koziara's percentage would be reduced from 13.539% of reported production to 13.41% of field proration allowable production. In light of the negligible difference it makes no sense to me to adjust the production portion of the formula at this late date.

Porosity Acre Feet

The second component of the participation formula is 40% porosity acre feet. In simple terms, this is an expression of how much space is available to contain oil or gas under a given tract of land. The Columbus #3 field is fairly well defined. That is, there were 39 wells drilled in the field, 16 of them were dry holes and 23 were producers. Each well drilled yields information about the geologic conditions of the reservoir. The precision with which the reservoir can be defined is directly proportional to the number of wells drilled into it. Each well brings new knowledge to be used in assessing the various parameters of the reservoir. This reservoir is a Salina-Niagaran reef. Organic material of this ancient marine reef, through lengthy chemical and physical processes, has become hydrocarbons. The Brown Niagaran hydrocarbon bearing portion of the reef is overlain with impervious layers of salts and carbonates. The origins of the hydrocarbon and structure of the reef are biological in nature. The reef mass is heterogeneous. This is in contrast to a reservoir that is of mechanical

origin, such as, a fault. All available data is used in order to evaluate the reservoir. Each well bore that penetrates the structure yields additional knowledge. Even dry holes yield useful information in terms of delineating the edges of the reservoir. The wells yield information only to the extent of the few inches the diameter of the drill bit encompasses and some additional radial distance reflected in electric logs run in the wells. In this field most of the wells were cored. When wells are cored a special drill bit is used that causes a cylinder, called the core barrel, to cut a continuous length of rock from the interval drilled. This yields a continuous sample of the rock penetrated. The cores are taken to a laboratory and analyzed to determine porosity, permeability, and other rock characteristics. The electric logs involve the sending of instruments along a wire line down the well bore which send out various kinds of signals and measure the values returned from the adjacent rock. Depending upon the type of log various types of information can be gathered.

Since cores were taken of most welts the primary source of data was the core analysis. In the determining of porosity acre feet, the process is to determine the number of feet of productive well bore which has a porosity greater than 5% and then determine the average porosity for the productive zones. As previously stated, these reservoirs are not homogenous. This means that porosity is not continuous, but random. For example, a well may have 10 feet of highly porous rock, the next few feet may be less than 5% porosity, followed by several feet which may again be highly porous. The porosity feet figure gives a relative value for the reservoir with which to compare the various wells. The end product is a net productive reservoir relationship between wells. The determination of net porosity feet is not a simple matter. This reef is to some extent water filled. The porous zones within the reservoir which are water filled are not capable of producing oil or gas. Therefore an oil/water contact must be determined, and

the porosity feet below the oil/water contact are not considered as productive reservoir. The participation formula also distinguishes between reservoir that is oil productive and reservoir that is gas productive. Again, a determination must be made of the gas/oil contact. The porosity feet above the gas/oil contact are gas bearing, below the gas/oil contact is the oil bearing zone. The change from water to oil and oil to gas is not always clearly defined and smooth. Sometimes it is difficult to determine the precise point at which one media changes to another. The term "transition zone" is used to express that area between oil and water or, oil and gas. The primary method of determining porosity feet used in this field was by core analysis.

The participation formula credited each well with its porosity acre feet. The prior calculations yield porosity feet which is the height of productive interval multiplied by the average porosity for that height. To determine porosity acre feet it is necessary to interpret between the various well bores and contour the porosity feet values. The contouring of various values on a base map yields isopach maps.

These contour maps can then be measured and a value given to the amount of acres within a given contour line. The use of contour maps in oil and gas reservoir study is common. It is a well recognized and accepted tool. There was no issue in this case as to the use of porosity acre feet determinations derived from the making of a contour map. In fact, I know of no other method to determine the porosity acre feet. The dispute at hand concerns the calculated values for height and porosity assigned to each well and the placement of the contours between wells. A change in height or movement of contours can cause substantial differences in the resultant porosity acre feet calculations.

That is not to say that plaintiff Koziara agrees that porosity acre feet is the best method for determining oil in place. It was their opinion that oil in place calculations should be made and oil reserve figures used to distribute production. It was their belief that the most fair and equitable method for distribution of the proceeds of unitized operation is a formula weighted 100% oil in place.

At the original unitization hearing Sun Oil Company offered a number of exhibits. These exhibits included geological cross-sections and various contour maps. Among those maps were a Brown Niagaran thickness map, oil and gas porosity contour maps, oil and gas net pay isopach maps, and oil and gas porosity feet maps. The oil and gas porosity feet isopachs were used in the participation formula, the other exhibits were not.

A careful review of all of the data and maps assembled by the parties reveals that the similarities of their conclusions are more marked than the dissimilarities. The substantial divergence as to the interpretations comes about when the data obtained from drilling the Koziara Tract 6 #3 well is reviewed. This well was drilled in 1983. There is no testimony in the record as to why this well was drilled approximately a decade after unitization had commenced. Each party views the results from the 6-3 well as a vindication of their respective positions.

Sun Oil is of the opinion that the well encountered geologic reservoir conditions reasonably within the range that their contour maps predicted. The plaintiff Koziara views the well as clear evidence of the presence of much greater reserves of oil than those credited to him by Sun's calculation. The compelling aspect of the 6-3 well, from the point of view of this Agency, is that the well did not exist at the time of unitization. The well could not have contributed any data to the original calculations. As previously discussed, this Niagaran Reef is of biological origin with porosity and permeability being random and not uniform.

Each well drilled gives accurate data as to the well bore location. Between well bores data must be interpretative. Therefore, were each of the owners of a tract within the unit given the opportunity to drill a well, they too would have additional data which may improve or depreciate the relative value of their tracts. It would both be unfair, and inequitable to utilize the 6-3 data to alter the interpretations of the productive reservoir.

The testimony concerning the 6-3 well was both long and involved. Every aspect of the 6-3 well was examined in great detail including the drilling, logging, and core analysis. Without exception every component of the data concerning the 6-3 well is in dispute. Drilling on the well commenced on August 19, 1983. On August 27, 1983, at a depth of 2,996 feet a lost circulation zone was encountered, and the drill bit dropped approximately five feet. At that time gas came to the surface and was flared until the well could be killed. It is the contention of the Plaintiff Koziara that Sun Oil Company pumped cement down the well to close off the loss of circulation zone. Mr. Koziara testified that he saw something pumped down the well. He further testified that during coring operations, following the resumption of drilling, part of the core was a cement plug drilled out from the lost circulation zone. He further testified that he saw an employee on the rig take a piece of core from the core rack and put it in his truck. Mr. Koziara also took samples from the shale shaker that he had analyzed; Plaintiff's Exhibits 35 and 36. He believes these analyses show that the material drilled was cement.

In contrast, the records of Sun Oil Company of the drilling and of the materials placed in the hole do not reveal any cement was placed in the lost circulation zone. The records of Sun Oil show that brine gel, cotton hulls, and Quick Seal were added to the well. These are the types of materials that would be expected to be placed in a lost circulation zone. The use of cement in lost circulation zones would be highly unusual. The purpose of lost cir-

culation material is to fill the pores of the rock close to the well bore. The materials placed in the hole are specifically designed for that purpose. There is no indication in the record that there was anything unusual about the lost circulation zone that would require extraordinary measures. While the encountering of lost circulation zones is not particularly common, it also is not that unusual. There are many places in the state where lost circulation zones are routinely encountered. The standard oil field practice is to treat these zones with lost circulation material. Additionally, if the loss zone is severe, a liner or casing may be placed over the zone to secure it. This was not necessary in this case. Open hole electric logs were run by Schlumberger on the 6-3 well; Sun Exhibits C and B. Those logs are consistent with a lost circulation zone or washout in the well bore. The response of the logs from 2,996 to 3,002 feet is inconsistent with the presence of cement in the bore hole which was drilled out. For example, the purpose of a caliper log is to show the condition of the hole. A caliper log is a tension device that rides along the edges of the hole and expands and contracts with the size of the hole. The caliper log shows a marked difference in hole size at the 2,996 foot depth. If the well had been filled with cement and drilled out, the side of the hole should be smooth. In light of the foregoing, it now becomes necessary to address Mr. Koziara's contention that the laboratory anaylsis reveals the presence of cement. It is interesting to note that the Laboratory report in addition to the chemical composition identifies sample #1 as pure dolomite and sample #2 a foreign substance. This is highly unusual. Dolomite is carbonate sedimentaly rock that may vary considerably as to mineral content within a reef. The conclusion that the cuttings are pure dolomite is suspicious.

There is nothing in the record to indicate the composition of cement used for oil field purposes. There also is nothing in the record to indicate the chemical composition

of Quick Seal. The conclusion that the well was cemented is not credible for a number of reasons. First, it is not a typical oil field practice to cement lost circulation zones. Second, the records made contemporaneous with the event all indicate the type of material that was placed in the hole. This material was the material expected to be used in a lost circulation zone. The electric log responses are entirely consistent with a lost circulation zone. The Laboratory reports are inconclusive. In order to agree with the proposition that cement was placed in the well it would be necessary to find that Mr. Gunn had lied under oath. I make no such finding. As to the core that Mr. Koziara claimed was removed, I find this testimony to be highly speculative in view of the fact I have just found there was no cement placed in the well bore. A review of the description of cores will show that some are light tan to white as Mr. Koziara described. Had Sun Oil used cement to block off this zone of less than six feet it probably would have made a minimal amount of difference. Because there was no core recovered and the logs are unreliable in the washed out zone, if that zone had been cemented, there would be no more available data than in the absence of the cement. There was no reason to cement the well bore and no benefit to be gained by concealing it.

The parties also differed over the net oil pay and porosity found in the 6-3 well. The available data from which to assess the porosity feet and gas porosity feet present in the well are the driller's log, the core analysis, and the electric logs. It should be noted that Mr. Lorenz was not provided the complete core analysis until after he had completed most of his work, and therefore he did not incorporate the results in his study. The principle point of disagreement is the selection of a gas/oil contact. The gas/oil contact is that point at which the oil phase is no longer predominately present in the reservoir and gas is present to the top of the reservoir. Mr. Lorenz found the oil/gas contact to be at minus 2,992 feet. Mr. Gunn, Sun's well

site geologist, found the gas/oil contact to be minus 3,046 feet. Mr. Cottrill, a geologist consultant to Sun, found the gas/oil contact to be minus 3,059 feet and Core Laboratories who did the core analysis found the gas/oil contact to be at minus 3,048 feet. Mr. Lorenz found that the average porosity for the oil section was 19.16%. Mr. Cottrill found it to be 13.13%. The significant difference in their analysis is the selection of a gas/oil contact. I find that the gas/oil contact of minus 3,048 feet selected by Core Laboratories is the most reliable. The analysis is based upon an actual physical examination of the rock and its properties. At the time of drilling the 6-3 well the secondary recovery operation had been underway for nine years. During that period of time large quantities of oil had been produced and large amounts of gas had been reinjected. Therefore, the reservoir fluids would not be present at the levels expected when the reservoir was originally drilled. Even though a substantial amount of oil present in the reservoir had been drained there still would be residual oil present in the rock. This is a solution gas reservoir and the oil/gas contact should remain constant. That is, where there is a water drive mechanism there is a possibility that the oil would have been forced upward in the column causing oil to rise higher than the original gas/oil contact. The evidence in this case clearly indicates that the gas cap has expanded forcing the oil down. As the oil is forced down it leaves behind residue and staining which will clearly identify the original gas/oil contact. I therefore conclude that based on an oil/gas contact of minus 3,048 feet a net oil pay column of 82 feet is reasonable.

Mr. Lorenz found an average porosity of 19.16%. Mr. Cottrill found an average porosity of 13.13%. In large part the difference in porosity is attributable to the portion above the gas/oil contact at minus 3,048. The lost circulation zone was at 2,996 feet to 3,001 feet. Mr. Lorenz credited this interval with a fairly high porosity. The end product is that Mr. Lorenz's 19.16% porosity is unreliable

because it includes the porosity values for 48 net feet that are in the gas column and not in the oil column. Even if for speculative purposes one were to assume that there were 82 net feet of oil pay in the 6-3 and that the porosity was 19.16%, the porosity feet assigned to the 6-3 location would be 15.71. If this value were contoured in it would provide a new data point and would require new contouring. However, this data is not inconsistent with the oil porosity feet map presented in the original unitization hearing.

The foregoing discussion of the 6-3 well data is not offered for the purpose of suggesting that it should properly be included for a review of the data presented at the original hearing. It continues to be my opinion that use of the 6-3 data, at this late date, is inappropriate. The discussion is included as a result of the broad parameters of the remand order from the Circuit Court and to provide enlightenment on this lengthy portion of the testimony should the Court so desire.

The tract participation formula for the Columbus 3 unit credited porosity acre feet as 40% of the formula for the distribution of unit proceeds. Porosity acre feet is one method of giving each tract credit for the underlying reservoir. This method gives each tract credit for the volume available to contain reservoir fluids. There are other methods of crediting tracts with reservoir fluids.

The other methods calculate the oil in place multiplied by the expected recovery percentage and allocate the recoverable oil or gas estimate to each tract. A critical component in the determination of oil in place is to know the water saturation of the formation. That pore space occupied by water reduces the amount of oil available for production. Using differing water saturation levels in the reservoir will produce considerable disparity in the calculation of oil in place. For example, Mr. Lorenz assumed a water saturation of approximately 30% and calculated

there were 9 million barrels of oil in the Columbus 3 field. Sun Oil Company using a water saturation of approximately 15% calculated that the oil in place was in excess of 12 million barrels of oil. Sun explained that they chose to use porosity feet instead of oil in place because they believed the available water saturation data was not reliable. The porosity feet for each well was determined primarily from core data. These were washed cores, therefore, water saturation data was not reliable. Additionally, the early 1970's electric logs are not good indicators of water saturation. Sun did make oil in place calculations for the purpose of determining the feasibility of secondardy recovery operations and to estimate the incremental oil to be recovered by the project.

The contour map used in making calculations for the formula was the oil porosity feet map. This map gives a value to each well which represents the net thickness of pay times the average porosity which is then contoured. Additionally, a contour map of the Brown Niagaran, a contour map of the net pay thickness, and a contour map of porosity were prepared. Mr. Lorenz prepared one contour map in a different fashion. He took the maps of Sun Oil for oil porosity and net pay and superimposed one over the other. Wherever the isolines drawn on each map crossed, he interpreted the value. For example, where a 15% porosity isoline crossed a 120 foot net pay line he considered that to be a net oil porosity feet value of 18. This yielded additional data points which were placed on a base map with the well data and contoured, Plaintiff's Exhibit #4. As can be seen by Plaintiff's Exhibit #4, this yielded considerably more data points.

A review of tract 6 shows there are two wells present which gives two actual data points. By using Mr. Lorenz's technique an additional 30 data points are added. The drawing of contour maps is both an art and a science. The science is to recognize characteristics of the productive structure, to properly assign values to the wells and to

recognize trends from the data. The art is in the contouring between data points. There are generally accepted methodologies and techniques for contouring. Therefore it would be expected that competent geologists would produce similar maps. The emphasis is on the word "similar". The greater the number of data points, the greater the similarity that would be expected. The end products will not be identical. The record contains all the original contour maps plus a series of maps that include the data obtained from the 6-3 well.

The question to be addressed in this matter is whether the porosity acre feet calculations of Sun Oil assign a fair and equitable share of the oil and gas to each tract within the unit. It is the position of Plaintiff Koziara that if Sun's data is to be used, it is more accurately portrayed by their Exhibit 4 which is an oil porosity acre foot map. This map was derived entirely from Sun's data doing an overlay of the original oil porosity and oil thickness maps. In Exhibit 4 the values resulting from a crossing of isolines of the two contour points were entered on the map and then a contour map created using the additional points derived from the two maps. The argument is that this method gives a large number of data points thus increasing reliability of the map. As previously stated, this exercise yields 30 data points in tract 6 where previously there were only two represented by the well bores. There are a number of frailties with this approach. At first blush it appears attractive because it provides additional data points. In actuality these data points are not representative of data but rather the result of merger of two interpretations. In the recontouring these interpretative points are given equal credence with actual data. Because the interpretative points out number the real data points on tract 6 by 15 to 1 the resultant contour map gives much greater weight to interpretive data than to actual data. A review of Exhibit 4 shows that a substantial portion of tract 6 is given porosity feet values between 18 and 23. The highest actual

porosity feet measurement recorded in the field from well data was less than 16. There is no data to support the 18 to 23 values. It is true that Mr. Lorenz did, in his analysis of the 6-3 well, find a value for porosity acre feet in the range of 23 porosity feet. However, that data was not included on Exhibit 4 and further the 6-3 well was improperly credited with excessive oil pay as a result of an erroneous gas/oil contact.

After careful examination of the porosity foot calculations of the individual wells by Sun and Mr. Lorenz, absent 6-3 data, I conclude that there is minimal difference. The differences expressed are well within the range that one would expect from the interpretation of the same data by two different people. This is true in spite of the fact that the methodology employed by Sun and by Lorenz in determining porosity feet was somewhat different. Sun Oil Company used a porosity cut-off of 5%. That is any section of the well bore with less than 5% porosity was considered nonproductive and not included in net pay. Mr. Lorenz used a porosity cut-off of 3% in his calculations. Mr. Lorenz used logs and cores and whatever other data was available to make his interpretations. Sun Oil used a somewhat more standardized approach in their evaluations. Mr. Lorenz picked individual oil-water contacts; Sun Oil used a uniform oil-water contact throughout the field. Sun Oil relied primarily on core data to determine porosity. In the case of missing cores, Sun Oil averaged the known porosity above and below the missing section and used that value for the interval of missing core. Mr. Lorenz used logs to evaluate the missing interval. The methodology used by Mr. Lorenz is probably preferable and should yield somewhat greater accuracy. The Sun methodology was a methodology agreed upon by the operators in the field to provide for uniform treatment from well to well throughout the field. In spite of the different approaches the end results remain quite similar. I therefore find that the original porosity acre feet isopach, Exhibit 12 original record,

is a fair and equitable presentation of the value for oil of each tract when compared to the other tracts in the pool. There was no challenge to the gas porosity initially determined by Sun Oil represented by Exhibit 13. I find this is a fair and equitable representation of the gas reserves present under each tract when compared to other tracts throughout the field.

If the data for the 6-3 well were to be added to the oil porosity feet map, the difference would be negligible. Original record Exhibit 12 shows the location of the 6-3 well to be within the 13 oil porosity foot isoline. The measured value for the 6-3 well is 10.77 oil porosity feet. Therefore the data is within a range that would be expected from the original map. Sun contoured the oil porosity feet on Exhibit W using the 6-3 well data. The contouring between the 6-3 well and 6-2 well on this Exhibit is somewhat unusual. The contours indicate a lowering of porosity feet between the two points. There should not be 7 and 9 porosity feet isolines between these two points. The top of the reef should flow smoothly through tract 6 and not be interrupted. It is my opinion that original Exhibit 12 is the most accurate portrayal of reservoir conditions.

During the course of the proceeding the Plaintiff Koziara's witness pointed out that a planimetering error had been made on tracts 3, 6, and 9. Sun Oil reviewed their data and replanimetered the subject tracts and found that an error had been made. The results of the replanimetering are demonstrated on Sun Exhibits NN, 00, and PP. Exhibit PP shows the two [sic] participation factor that would be arrived at by replanimetering tract 6 only. The result is that the Koziara interest would go from .1674799 to .1738652. This is a difference of 0.0063853.

The Participation Formula

The Plaintiff Koziara maintains that the participation formula embodied in the unit agreement for the Columbus

3 field is unfair and inequitable and violate of his correlative rights. They maintain that the most fair and equitable formula would be one that is based entirely on oil in place. They were of the opinion that the Supervisor had never utilized a formula for unitization which contained production as a factor. This assertion is wrong. The Supervisor has used any number of factors in any number of different combinations. The Unitization Act puts no constraints on the parameters to be used in a unitization formula.

The Act requires that the Participation Formula fairly distribute the proceeds of production and that a requisite percentage of interest owners agree to the plan.

Participation formulas are arrived upon as a result of meetings of various operators in the field who form a technical committee. The first stage is for someone to perform a feasibility study. This feasibility study involves a review of the geological and engineering aspects of the reservoir to determine if it is a viable candidate for secondary recovery. Such a study was performed in this instance but was not offered in evidence. In this case the operators met to determine the Participation formula and to agree upon the technical approach to be taken towards assigning reservoir values to each well. For example, a constant oil-water contact was agreed upon. The Committee agreed to the treatment for lost cores. The porosity would be averaged above and below for those intervals where the core was missing. The Committee settled upon the porosity acre feet method for the reservoir portion of the formula. The initial maps were revised to reflect these agreements and a final map was prepared. The Participation Formulas for each tract were developed and included in the unitization plan and plan for unit operations. 97% of the operator's interest ratified the unitization plan.

Is there justification for weighting the formula 60% current production? The fact that 97% of the working interest

owners agreed to that component of the formula is an indicator that each felt they were getting their fair and equitable share. There are a number of reasons to be advanced as to why current production is appropriate. This portion of the opinion will not review the discussion of the fourth quarter production. However, this portion of the opinion is predicated upon the fourth quarter allowables being used in the Participation formula. Current production is reflective of current income and allows for a recognition and maintenance of current income levels for those who are involved in the field. Current production is a measure of well capability. Current production based upon allowables is a measure of the amount of oil and gas to be produced from a well without permitting waste.

An important component of correlative rights is the prevention of waste. Each operator is entitled to his fair share of the hydrocarbons in the reservoir provided he can recover that share without committing waste. The allowables determine the amount of oil that can be recovered without waste. Therefore, use of allowables is protective of correlative rights. The use of allowables reflects the relative well capability to recover primary production. The second component of formula 40% porosity acre feet gives credit for the reservoir volume underlying each tract. Neither component of the formula can be said to precisely measure the fair share of each and every tract. In this instance the allowables, because they are based on actual gas-oil ratio tests of each individual well, are a measure of the wells ability to recover its fair share of the reservoir products and energy. The porosity acre feet portion has been criticized because it does not give credit to actual volumes of oil and gas in place. This is because there is no reflection of the water saturation for each tract. Mr. Lorenz in Exhibit #1 went through each and every well and assigned, based on the electric logs and core, a water saturation to each tract. The end product was that he estimated there were around 9 million barrels of oil in

place. Since the actual recovery has been over 6 million barrels of oil, it is clear that an estimate of 9 million barrels in place is incorrect. Sun estimated there were 12 million barrels of oil in place. In both cases the same data was reviewed presumably using the same methodology. The disparity in the volumetrics can be attributed to differences in water saturation. Mr. Lorenz assumed a much greater water saturation than did Sun Oil. Therefore, Sun Oil determined that there was more oil in the reservoir than Mr. Lorenz.

The record is replete with challenges to data, challenges to the interpretations of data and challenges to the conclusions drawn from both. All of this gives the appearance that there is only one way to do things and only one answer that is correct. There are generally accepted methods to perform reservoir analyses. These analyses are generally dependent upon the quantity and quality of available data. The greater the amount of good quality data the more reliable the analyses become. In the case of the Columbus #3 field there were available both a good quantity and quality of data. Anyone making an analysis would always prefer to have more data, however, there was no shortage of data in this case. The reservoir was fairly well defined and developed. The field was developed on 40 acre units. The record clearly demonstrates that Sun reasonably construed the data and that they fairly and equitably determined the participation factors for all parties. I conclude that the participation formula provides for the distribution of the fair and equitable share of all interests within the unit.

Miscellaneous Matters

A number of other matters were in factual dispute at the hearing. All of the various contentions of error or allegations of concealment, fraud or misstatement have been considered. It is my opinion that there was no scheme to deprive Koziaras of their share. All Sun witnesses tes-

tified that they were unaware of any prior overproduction at the time of unitization. In fact, it appears they had very little knowledge or contact with day-to-day operations, most were out of state. There is no evidence that the Sun representatives approached the unitization in other than a professional manner. The substantial majority of the Koziara interests lies in tract 6. The working interest in this tract is owned by Sun. If the tract 6 interest was shortchanged, Sun would suffer a corresponding loss. To suggest that Sun consciously deprived Koziaras to benefit other tracts is not supported by the evidence or any reasonable inference to be drawn from it. There is nothing in the record that supports anything other than a professional difference of opinion.

I am compelled to comment on the plaintiff Koziara's "Technical Summary". In 20 years of practice I have never seen such a display of unrestrained rhetoric. The entire pleading is laced with misstatement, extra-record excursions, and hyperbole. All witnesses adverse to their interest are accused of lying, incompetence or both. This type of exercise does not provide assistance in reviewing the record, it just obscures it.

Those findings of fact proposed by the parties inconsistent with and not addressed by this Proposal for Decision, are rejected as being contrary to the evidence.

Conclusions of Law

The law governing the formation of units for unitized operations and governing this matter on remand is the "Michigan Unitization Law" MCL 319.351; MSA 13.139(101). The relevant language to this matter is contained in Section 6 which states in part

> "The order of the Supervisor shall be upon terms and conditions that are fair, reasonable and equitable, and shall prescribe a plan for unit operations that includes: (C) An allocation to the separately owned tracts in

> the unit area of all the oil and gas that is produced from the unit area and is saved, excepting that production which is used in the conduct of operations on the unit area or unavoidably lost. A separately owned tract's fair, reasonable and equitable share of production shall be measured by the value of each such tract for oil and gas purposes and its contributing value to the unit in relation to like values of all tracts in the unit."

There have been a number of cases that have interpreted the meaning of a fair and equitable share of production in the regulatory context. The Michigan Public Service Commission prorates gas reserves in a manner somewhat similar to unitization. The Commission allocates the total production of gas from a common reservoir among all of the wells within the reservoir. In a challenge to the regulatory authority of the Public Service Commission the Court of Appeals stated as follows:

> "Absent regulation, natural gas and oil are subject to the rule of capture under which, essentially, the first person to take them is entitled to them even though the well drains natural resources from under the land of another. See Williams & Meyers, Oil and Gas Law, pp 782-784. In most American jurisdictions, the rule has been modified by the 'fair share' or 'ownership-in-place' rule. Michigan is an ownership-in-place state. *Manufacturers Nat'l Bank* v *DNR*, 420 Mich 128, 141; 362 NW2d 572 (1984), Under the rule, 'each owner of the surface is entitled only to his equitable and ratable share of the recoverable oil and gas energy in the common pool in the proportion which the recoverable reserves underlying his land bears to the recoverable reserves in the pool.' *Wronski* v *Sun Oil Co.*, 89 Mich App 11, 22; 279 NW2d 564 (1979), quoting from 8 Nat Res Law 61, 64-65 (1975). 'Fair share'

> is implemented by a number of procedures, including balancing, retroactive adjusting and proration.
>
> Williams & Meyers, *supra*, pp 62, 756, 695-696. The proration which we are concerned about in this case is an allocation of the total production of gas from a common reservoir among the wells drilled into the reservoir." *N Mich Exploration Co.* v. *PSC* 153 Mich App 635, 638-639 (1986).

In the case of *Traverse Oil Company* v *Natural Resources Commission*. 153 Mich App 679(1986) an order of the Supervisor of Wells which allocated production on a surface acreage basis was challenged alleging that the Supervisor abused his discretion because he did not allocate upon the actual pool or reservoir underlying the property. The Court found that the Supervisor did not allocate production to barren lands and quoted the language used by the Supervisor in the order

> "I further conclude that the appropriate spacing and production unit is the SE1/4 NE1/4, Section 26. This unit provides for all parties to receive their fair and equitable share of the reservoir. Such spacing is necessary to encompass the maximum area to be economically and efficiently drained by one well. Although the precise parameters of the reservoir cannot be ascertained, it appears to substantially underlay the unit and sharing in the proceeds on the surface acreage basis is deemed fair and equitable."

A case with many parallels to the case at hand is *Gilmore* v *Oil and Gas Conservation Commission* 642 p 2d 773(1982). This is a Supreme Court of Wyoming opinion addressing an appeal from an Oil and Gas Conservation Commission order adopting a plan of unitization for an oil and gas field. The Commission had found that waste would occur by delaying secondary recovery and ordered a curtailment of production within the field pending unitization.

This curtailment motivated the various operators to attempt to agree on unitization for the field. The Court at page 775 states,

> "The operators held various meetings at which they voted on formula to be used in allocating production under unitization. The 81 working interest owners considered a total of 71 formulae.
>
> Naturally, each of the owners wanted parameters favorable to them and wanted more weight to be given these parameters. After voting on almost 60 formulae, the owners were frustrated in their attempt to find one that would receive the statutory approval. As a result, they examined their voting records and used a computer to arrive at an equitable compromise formula that could receive the required approval. The resulting formula #67 at issue here, received 75.89% approval. It appeared that no greater percentage would approve any formula proposed."

The Appellant objected to the unitization formula because he believed the production components of the formula were unfair to him and that the survey used shorted him by over 30 acres. A parties agreed e governmental survey used was inaccurate. The United States owned 62% of the royalty interest in the unit area and would only approve based on the old survey. This effectively gave veto power over the entire project to the United States.

The Gilmore case discusses the correlative rights of the appellant at pp 779,

> "he contends that in preventing waste his correlative rights cannot be ignored. We agree, but hold that substantial waste cannot be countenanced by a slavish devotion to correlative rights. We are faced with the delicate balancing problem between the prevention of waste and correlative rights, but prevention of waste is of primary importance.

> The right to produce one's fair share from the pool is limited by and subject to the practicalities of the situation and the ability to produce without waste. Other owners have a concomitant right to produce from the pool without waste." "In striking a balance between conservation of natural resources and protection of correlative rights the later is secondary and must yield to a reasonable exercise of the former."

The court later states, in conclusion, at page 781,

> "the group effort and compromise should not be discarded because of Appellant's general disagreement with the plan. Appellant seems to expect perfection. Justice was accomplished here, as much as could be under the circumstances. This litigation should end."

The cornerstone of governmental regulation of the oil and gas industry is the prevention of waste.

There is a strong public policy favoring the efficient production of oil and gas reserves so that the maximum recovery of oil and gas can be attained. The regulation of the common source of supply to prevent waste has long been recognized as a legitimate regulatory tool. In this instance the common source of supply has been regulated to allow for operations that maximize recovery. The success of this unit in substantially increasing the ultimate recovery of oil is a matter of record. The unitization plan does provide for a fair and equitable distribution of the benefits and burdens of unitization.

One of the allegations of the Plaintiff Koziara is that the Supervisor has never used a participation formula in a unitization similar to the one incorporated herein. It is his belief that unitization is to be based upon oil in place or pore volume of the reservoir. There is no set unitization formula. The statute does not require it and practical reality precludes it. The formula must be reflective of the data available and attain the agreement of the parties. Williams

& Myers, Oil and Gas Law, abridged edition page 670 states,

> "Perhaps the most frequently employed basis for allocating pooled unitized production is surface acreage. Another allocation method considers both acreage and other factors, e.g., saturated hydrocarbon pore space. Thus, the 50/50 allocation formula sustained by the Court in *Woody v State Corporation Commission* allocated 50% of the unit production on an acreage basis and 50% on the basis of saturated hydrocarbon pore space. Obviously such a formula may employ any percentage factor; in this case for example, some parties advocated a 70/30 formula and still others advocated a 90/10 formula, viz., giving more than 50% credit to saturated hydrocarbon pore space; one opinion was that in any unitization case the oil should be divided on the basis of 100% saturated by hydrocarbon pore space.
>
> When all of the premises included within a voluntary or compulsory unit have previously been developed, the parties may agree to an allocation of unit production on the basis of prior production."

The Supervisor has employed numerous participation factors including surface acreage, allowables, production history, oil and gas reserves and other factors. The unitization formula for the Columbus #3 field provides for a fair and equitable distribution of the benefits and burdens of unit operation.

The formula recognizes current productive capacity and potential future reserves. The initial responsibility for development of the participation formulae lies with those who own interests in the field. The task of the Supervisor is to determine if the statutory criteria have been satisfied. The only criteria to be addressed by this matter is the fairness and equity of the formula. I conclude as a matter of law that the formula treats all interests in a fair and

equitable manner. There is no question that the Koziara interests would prefer a formula that favored hydrocarbon pore space, such a formula was not agreed upon. Similarly, other owners might find other formulas to be to their benefit. The inquiry is not limited to what formula might best benefit a single tract. The inquiry must be directed towards the treatment of all tracts. All tracts were treated in the same manner and all tracts derived their fair, and equitable share.

Proposal

Based on the foregoing findings of Fact and Conclusions of Law it is proposed that the participation formula developed in this case be left undisturbed. Although a slight adjustment might be made to the participation factor by substituting field allowables for the fourth quarter production and because of a planimetering error, those changes are minor and well within any likely margin of error.

All interests joined the unit on the basis of the tract allocations and have shared proceeds by its application. The overproduction found by the St. Clair County Circuit Court did not influence the participation percentages allocated to the various tracts. The proceedings before the Supervisor in the original hearing resulted in a fair and equitable distribution of benefits and burdens of unit operation. The Order of the Supervisor should be affirmed.

5/25/86
Dated

William C. Fulkerson
William C. Fulkerson
Administrative Law Judge

AFFIDAVIT

STATE OF MICHIGAN)
) SS
U.S. DISTRICT COURT)

I, Dr. M. Y. Joshi, a Petroleum Engineer, first being duly sworn, deposes and states as follows:

1. I was asked to review all pertinent information relative to the Columbus "3" Field in St. Clair County, Michigan, and to determine whether the Dietrichs and the Koziaras received their "fair share" of the revenue received from the productin of oil and gas resources from tracts one, two and six.

2. That although Defendants are withholding critical data necessary to render a complete opinion, I reviewed all data either supplied at the Michigan Department of Natural Resources or made available by Defendants in other legal proceedings relative to this field.

3. It is clear from my study of the field that Plaintiffs were denied their "fair share" as is required by Michigan law as a result of intentional misconduct, errors in professional judgment, and a negligence on the part of Defendant and their employees.

4. That notwithstanding MCL 319.13 required the Defendants to abide by rules issued by the Supervisor of Wells during the effective period of Proration (February 1, 1971 through June 22, 1974), Defendants did not adhere to those rules although it is clear from the statute that such conduct is felonious.

5. That data supplied by Defendants show that the Supervisor's Rules 299.1503; 299.1504; 29.1506; 299.1507; and 299.1508 were consistently violated during that time period.

6. That as a result of these violations, valuable oil revenue was denied to Plaintiffs because oil was drained from the tracts that they had interest in.

7. That there is no way a royalty interest owner such as Plaintiffs or their predecessors could have known about Defendants misconduct because of the esoteric nature of the data that had to be reviewed before such a determination could be made.

8. That my opinion is based upon my knowledge and experience as a Petroleum Engineer for the last 20 years.

9. That Defendants withheld this information from the State of Michigan, the Plaintiffs and other royalty interest holders of the Columbus "3" Field.

10. That notwithstanding that Defendants knew or had to know that the Production Figures for the Pforation period had nothing to do with the wells ability to produce oil, Defendants, in petitioning for a Unitization of the field, used a 60/40 formula for determining the participation percentages for the royalty interest holders.

11. This 60 percent assigned to production overcredited tracts where Defendants were overproducing one well and attributing that production to other wells in violation of the Supervisor of Wells Proration Order.

12. The net effect of this misconduct was to substantially underrepresent the participation percentage that was assigned to the Plaintiffs and to overcredit tracts where there was less of an oil reserve and less of a royalty that had to be paid by Defendants.

13. That there are substantial problems with the "professional" interpretation by Defendants of the geology of the Columbus "3" Field. Errors, incorrect interpretations, and intentional misconduct can be seen.

14. That there is no way that Plaintiffs could have known of Defendants misconduct by a review of the data that Defendants sent to Plaintiffs and/or the letter that sought agreement to the Unitization of the field that stated that scientific study had been made of the field by

Defendants and that royalty interest owners would receive their fair share. Defendants clearly misrepresented the facts to the Dietrichs predecessors to obtain their agreement to the Unitization. The Dietrichs were and are being substantially denied their fair share of revenue from the field as is required by law.

15. That it is my professional opinion that Defendants conduct can in no way be stated to at a level of a "prudent operator."

16. That Plaintiffs' participation percentage, had Defendants properly represented them, would be far in excess of the approximately 17% they are credited with at present.

17. It is clear that Defendant's conduct was goal oriented, i.e. that is to obtain the Unitization of the Columbus "3" Field and that without the "discrepancies" that I found, Defendants could not have unitized the field or obtained as great a return on their investment in the wells in the southern region of the field.

18. The net effect on Defendant's conduct was to financially harm the Plaintiffs in this matter.

FURTHER, Deponeth sayeth not.

M. Y. Joshi

Dated: March 25, 1988

Subscribed and sworn to before me
this 25th day of March, 1988.

Susan L. Clark

Notary Public, Wayne County, Michigan
My Commission Expires: February 14, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

VS.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Defendants.

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
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LYNAM & ASSOCIATES
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MOTION IN LIMINE TO CLARIFY AND/OR AMEND FINAL PRETRIAL ORDER

Plaintiffs through their attorney, JACK C. CHILINGIRIAN, request that this court clarify and/or amend its Final

Pretrial order dated June 8, 1992, and in support states as follows:

1. Page 2, paragraph 2 of the Final summarizes a portion of the Plaintiffs' claims as follows:

> "Plaintiffs allege that in November of 1984 through March of 1985, Defendant, Sun Oil Company's records showed that an additional 881,071 barrels of oil were produced in the Columbus III field between November, 1984 and March, 1985 for which Plaintiffs were not compensated. Plaintiffs further allege that "said figures were subsequently removed from the production records after an inquiry was made by Eugene Koziara." (Amended Complaint, Paragraphs 45 and 45; Plaintiffs' Claims, submitted October 30, 1990)."

2. Defendants now claim that the Plaintiffs have committed themselves to prove facts at trial which would show that the 881,071 barrels of oil were actually *produced* during November, 1984 and March, 1985.

3. Defendants are splitting hairs and attempting to have this court read the above referenced portion of the Final Pretrial Order in a hyper-literal way.

4. Plaintiffs have always claimed that the Defendant's records during the time period between November, 1984 and March, 1985, showed the additional 881,071 barrels of oil produced. This does not mean that the barrels of oil were actually produced during that time period. Evidence may or may not be elicited at trial to show exactly when the barrels of oil were produced.

5. It was not the intent of the Plaintiffs to allege and claim that the 881,071 barrels of oil were actually produced during the time period between November, 1984 and March, 1985. Plaintiffs claim is and always has been that

the records during that time period show the production during those time periods.

WHEREFORE, the Plaintiffs request that this court enter an order amending the Final Pretrial Order to properly reflect the Plaintiff's claims or enter such other order as may be appropriate to allow the Plaintiffs to claim that the 881,071 barrels of oil may have been actually produced during time periods outside the November, 1984 through March, 1985 time period.

Respectfully submitted,

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

DATED: July 1, 1992

BRIEF IN SUPPORT OF MOTION IN LIMINE TO CLARIFY AND/OR AMEND FINAL PRETRIAL ORDER

FRCP 16 (e) provides that the Final Pretrial Order shall control the subsequent course of the action unless modified by a subsequent order. The Rule goes on to state "the order following a final pretrial conference shall be modified only to prevent manifest injustice".

Courts have been willing to amend the Final Pretrial Order or clarify it when justice requires. Rule 16 was not intended to be a trap for unwary counsel and their litigants. *Peter Eckrich and Sons Inc.* v *Selected Meat Co.*, 512 F2d 1158 (1975, CA7 Ill.). Here, Defendants wish to trap the Plaintiffs by preventing them from arguing that the barrels of oil may have been produced at different times but that the records showing their production exist from November, 1984 through March, 1985.

In *Insurance Co. of North America* v *Northwestern Nat. Ins. Co.*, 494 F2d 1192 (1974, CA6 Mich.), the trial court

allowed additional proof to explain a stipulation that was entered into as part of the pretrial order. The Court of Appeals held that the trial court did not err in allowing additional proof which it considered essential to adjudicating the controversy, since the facts as contained in the stipulation were largely bare-bones, and additional proof did not contradict agreed facts, but added flesh and life to them and presented an understandable controversy to which the judge could apply the law and the facts.

In the instant case, the stipulation is a brief explanation of the Plaintiff's claims. Plaintiffs had no intention of being barred from introducing further evidence to explain their claims. Plaintiffs had no intention of claiming that the 881,071 barrels of oil were all actually *produced* during the time period reflected in Sun Oil's records. Plaintiff has always intended to allow the jury to determine when the barrels were actually produced based on the evidence to be presented at trial.

WHEREFORE, the Plaintiffs request that this court enter an order amending the Final Pretrial Order to properly reflect the Plaintiff's claims or enter such other order as may be appropriate to allow the Plaintiffs to claim that the 881,071 barrels of oil may have been actually produced during time periods outside the November, 1984 through March, 1985 time period.

Respectfully submitted,

JACK C. CHILINGIRIAN (P 11838)
Attorney for Plaintiffs
24055 Jefferson Ave., Ste. 200
St. Clair Shores, MI 48080
(313) 777-0400

DATED: July 1, 1992

State of Michigan
Department of Natural Resources
Supervisor of Wells

CAUSE NO. (A) 1-5-73

IN THE MATTER OF THE PETITION OF SUN OIL COMPANY FOR UNITIZATION OF THE COLUMBUS SECTION "3" SALINA-NIAGARAN FORMATION POOL, ST. CLAIR COUNTY, MICHIGAN FOR THE PURPOSE OF CONDUCTING SECONDARY RECOVERY OPERATIONS BY PRESSURE MAINTENANCE

REPORT OF THE SUPERVISOR OF WELLS

On March 20, 1973 Sun Oil Company of Tulsa, Oklahoma, pursuant to the provisions of Act No. 197 of the Public Acts of the State of Michigan, 1959, filed a petition with the Supervisor of Wells for an Order providing for the unitized management, operation and pressure maintenance of the Salina-Niagaran Formation, common source of supply in a specified area designated as the Columbus Three Unit located In St. Clair County, Michigan.

After due notice as provided in Act No. 197 of the Public Acts of the State of Michigan, 1959 and in compliance with the Rules of Procedure in Public Hearings before the Supervisor of Wells, a public hearing was held on said Petition on May 15, 1973 in the City of Lansing, Michigan. At said hearing before the Supervisor of Wells the petitioner submitted proof, exhibits, evidence and testimony relating to a plan of unitized management, operation and pressure maintenance which the Petitioner recommended be approved by the Supervisor of Wells. Other interested parties were afforded an opportunity to be heard In connection therewith.

FINDINGS OF FACT

Pursuant to review and consideration, the Supervisor of Wells finds:

1) That the unitized management and operation of the Columbus Three Unit in St. Clair County as described in said Petition is reasonably necessary to substantially increase the ultimate recovery of oil and gas therefrom;

2) That the type of operation contemplated by the Unit Agreement and Unit Operating Agreement is feasible, will prevent waste, and will protect correlative rights;

3) That the estimated additional costs of conducting such operations will not exceed the value of the additional oil and gas recovered;

4) That the Petitioner submitted a Unit Agreement and Unit Operating Agreement which constitute a plan of Unit operation. The evidence shows that such plan has been approved in writing by those persons to be required to pay at least 75% of the costs of the Unit operation (as required in Section 7, P.A. 197) but has not been approved by the required 75% of the owners of record of interests that are free of costs.

CONCLUSIONS

That Act No. 197 of the Public Acts of the State of Michigan, 1959, applies to the Petition of Sun Oil Company and these proceedings before the Supervisor of Wells;

That the Supervisor of Wells has jurisdiction of the subject matter and the persons interested therein; that due and proper notices of the petition and of the time, place, and purpose of the hearing was given as required by law;

that all interested parties were afforded an opportunity to be heard therein; and

That in the interest of obtaining the benefits of unit operation, the prevention of waste, and the protection of correlative rights, this petition should be granted. However, the petitioner has not obtained approval in writing from those persons who are owners of record of at least 75% of the production or proceeds thereof that are credited to interests which are free of cost such as but not limited to royalties; overriding royalties and production payments as provided in Section 7 of Act No. 197 of the Public Acts, State of Michigan, 1959.

DETERMINATION OF THE SUPERVISOR OF WELLS

The plan for Unit operation, as set forth in a Unit Agreement and a Unit Operating Agreement, both submitted into evidence, is found to be appropriate for carrying on Unit operation and for the protection and adjustment of correlative rights and is found to contain each of the other requirements necessary for the issuance of an order as provided in Section 6, Public Acts, State of Michigan, 1959. This being the case, the plan for Unit operation is approved subject to the provision below.

That upon the Petitioner, Sun Oil Company, obtaining and filing written approval of the Unit Agreement and Unit Operating Agreement from at least 75% of the Interests which are free of cost the Supervisor will hold a supplemental hearing as provided in Section 8 of Act No. 197, Public Acts, State of Michigan, 1959. Pursuant thereto, if written approval is found within the prescribed time, the Supervisor shall issue his order for unitization declaring the plan effective, as petitioned, setting forth the terms and conditions and the date for commencement of unit operation.

Signed and ordered published this twentieth day of June, 1973.

ARTHUR E. SLAUGHTER
SUPERVISOR OF WELLS

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES
SUPERVISOR OF WELLS

ORDER NO. (A) 1-74

IN THE MATTER OF THE PETITION OF SUN OIL COMPANY (DELAWARE) FOR UNITIZATION OF THE COLUMBUS SECTION "3" SALINA-NIAGARAN FORMATION POOL, ST. CLAIR COUNTY, MICHIGAN, FOR THE PURPOSE OF CONDUCTING SECONDARY RECOVERY OPERATIONS BY PRESSURE MAINTENANCE

REPORT OF THE SUPERVISOR OF WELLS

On March 20, 1973, Sun Oil Company (Delaware) of Tulsa, Oklahoma, pursuant to provisions of Act No. 197 of the Public Acts of the State of Michigan, 1959, filed a petition with the Supervisor of Wells for an Order providing for the unitized management, operation and pressure maintenance of the Salina-Niagaran Formation, common source of supply in a specified area designated as the Columbus Three Unit located in St. Clair County, Michigan.

After due notice as provided in Act No. 197 of the Public Acts of the State of Michigan, 1959, and in compliance with the Rules of Procedure in Public Hearings before the Supervisor of Wells, a public hearing was held on May 15, 1973, in the City of Lansing, Michigan. At said hearing before the Supervisor of Wells the Petitioner submitted proof, exhibits, evidence and testimony relating to a plan of unitized management, operation and pressure maintenance which the Petitioner recommended be approved by the Supervisor of Wells. Other interested parties

were afforded an opportunity to be heard in connection therewith.

The determination of the Supervisor of Wells issued in this matter on the 20th day of June, 1973, approved the plan for unit operation subject to the Petitioner, Sun Oil Company, obtaining and filing written approval of the Unit Agreement and Unit Operating Agreement from at least 75% of the interests which are free of cost and the Supervisor holding a supplemental hearing as provided in Section 8 of Act No. 197, Public Acts, State of Michigan, 1959.

On May 3, 1974, Sun Oil Company (Delaware) of Tulsa, Oklahoma, pursuant to provisions of Act No. 197 of the Public Acts of the State of Michigan, 1959, filed Petition with the Supervisor of Wells for a final order providing for the unitized management, operation and pressure maintenance of the Salina-Niagaran Formation, common source of supply in a specified area designated as the Columbus Three Unit located in St. Clair County, Michigan.

After due notice as provided in Act No. 197 of the Public Acts of the State of Michigan, 1959, and in compliance with the Rules of Procedure in Public Hearings before the Supervisor of Wells, a supplemental public hearing was held on June 25, 1974, in the City of Lansing, Michigan. At said hearing before the Supervisor of Wells the Petitioner submitted proof, exhibits, evidence and testimony that the Unit Agreement and Unit Operating Agreement which constitute a plan of unit operation, have been approved in writing by those persons required to pay at least 75% of the costs of unit operation and by the owners of record of at least 75% of the interests that are free of costs; the Petitioner recommended final approval of the plan of unitization and pressure maintenance for secondary recovery purposes by the Supervisor of Wells; and Petitioner asked that the plan of unitization become effective at 7:00 A.M., June 30, 1974. Other interested

parties were afforded an opportunity to be heard in connection therewith.

FINDINGS OF FACT

1) That the unitized management and operation of the Columbus Three Unit in St. Clair County as described in said Petition is reasonably necessary to substantially increase the ultimate recovery of oil and gas therefrom;

2) That the type of operation contemplated by the Unit Agreement and Unit Operating Agreement is feasible, will prevent waste, and will protect correlative rights;

3) That the estimated additional costs of conducting such operations will not exceed the value of the additional oil and gas recovered;

4) That the Petitioner submitted a Unit Agreement and Unit Operating Agreement which constitute a plan of Unit Operation. The evidence shows that such plan has been approved in writing by those persons to be required to pay 97.75476% of the costs of the Unit operation and has also been approved by the owners of record of 76.65132% of the interests that are free of costs.

CONCLUSIONS

That Act No. 197 of the Public Acts of 1959 and Act No. 61 of the Public Acts of 1939, as amended, applies to the Petition of Sun Oil Company (Delaware) and these proceedings before the Supervisor of Wells.

That the Supervisor of Wells has jurisdiction of the subject matter and the persons interested therein; that due and proper notices of the Petition and of the time, place, and purpose of the hearing was given as required by law;

that all interested parties were afforded an opportunity to be heard therein; and

That in the interest of obtaining the benefits of unit operation, the prevention of waste, and the protection of correlative rights, this petition should be granted.

ORDER OF THE SUPERVISOR OF WELLS

It is therefore ordered by the Supervisor of Wells as follows:

1) That the Petition of Sun Oil Company (Delaware) as Unit Operator be granted and that the Columbus Three Unit is hereby created in accordance with and subject to the terms, provisions, and conditions of the Unit Agreement and Unit Operating Agreement as filed in these proceedings.

2) That the Columbus Three Unit Area shall be the area outlined on the Map, "Exhibit "A", attached to the Unit Agreement and that the Unit Agreement and Unit Operating Agreement are made a part of this order by reference with the same force and effect as if set out herein in their entirety.

3) That each of the tracts within the Unit Area, as shown on Exhibit "A", attached to the Unit Agreement, subject to the terms and provisions of the Unit Agreement and Unit Operating Agreement, shall participate in the unit production and in other benefits and burdens of the Unit in accordance with the specified tract participation.

4) That those persons owning working interests not signing the Unit Agreement and Unit Operating Agreement shall be carried by the Unit Operator and shall be charged reasonable interest in the amount of seven per cent (7%) per annum for all operating costs and costs of development advanced as provided for in the Unit Agreement and Unit Operating Agreement, payable solely out of such person's share of unit production.

5) That the Columbus Three Unit be operated exclusive of and as an exception to the Proration Order and Spacing Order for the Columbus Section "3" Salina-Niagaran Formation Pool.

6) That the pressure maintenance program be initiated for improved recovery permitting the use and injection of water and produced brine and gas into the Niagaran Brown Dolomite Formation producing zone.

7) That the Unit Operator, Sun Oil Company (Delaware), shall from time to time make such reports to the Supervisor of Wells concerning the operation of the unit as may be requested.

8) That the Unit Agreement and Unit Operating Agreement are hereby made effective and that unit operations under these agreements shall be commenced on June 30, 1974, at 7:00 A.M.

The Supervisor of Wells retains continuing jurisdiction over the Columbus Three Unit in order that he may exercise such administrative control as is consistent with his powers and duties as established by the statutes of the State of Michigan.

Signed and ordered published this 25th day of June, 1974.

A. GENE GAZLAY
SUPERVISOR OF WELLS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

v.

SUN EXPLORATION and PRODUCTION COMPANY and
SUN OPERATING LIMITED PARTNERSHIP,
Defendants

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LYNAM & ASSOCIATES
BY: TERENCE V. LYNAM (P 26490)
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MOTION FOR FRCP 11 SANCTIONS

NOW COME DEFENDANTS by their counsel and move this Court for an Order granting them sanctions against Plaintiffs saying:

1. On July 8,1992 this Court entered an Order which dismissed Count V, the last remaining count in this action,

based upon Plaintiffs' admission, on the morning of the commencement of trial, that Plaintiffs were unable to present proofs essential to their case. This Order provided that Defendants be entitled to costs.

2. Defendants interpret this to include, at this point, statutory costs only, which would not require payment of actual out- of-pocket expenses, including reasonable attorneys fees, incurred by Defendants as a result of Plaintiffs' untimely admission regarding the status of their proofs (or lack thereof).

3. Defendants aver that the record of this case calls for the imposition of sanctions under FRCP 11, and Defendants so move this Court.

4. From Defendant's perspective, it is impossible to form an opinion as to the sharing of the responsibility between Plaintiff and counsel for the events and consequences which led ultimately to the inordinately expensive dismissal of Count V. However, Defendants contend that Plaintiff Edgar Dietrich's background is of such a nature as to place responsibility upon him unusual to a party vis-a-vis his counsel.

5. Plaintiff Edgar Dietrich is an attorney who has been engaged in the practice of law since 1959 (Dietrich Dep. Trans., Page 5) and at the time of filing of this action was the directing and possibly only shareholder of Dietrich and Cassavaugh P.C., the then attorneys of record for Plaintiffs. Defendants believe that Edgar Dietrich was fully aware of the effects of actions taken by counsel on his behalf and that he ordered all such actions for the purposes of harassment of Defendants, delay, and the increase of Defendants litigation costs.

6. As this Court is well aware, after the February 10, 1992 dismissal of Counts I, III, and IV Defendants urged Plaintiffs to voluntarily dismiss Count V. Indeed, Plaintiffs tried to bargain for such dismissal contingent upon this

Court's waiver of substantial sanctions previously imposed. When Defendants would not agree to allow Plaintiffs to avoid the consequences of their prior inappropriate behavior, Plaintiffs, with full knowledge of the status of their proofs, undertook to pursue a course of harassment.

7. In its Order Accepting the Report and Recommendation of the Magistrate, this Court implicitly gave Plaintiff the benefit of the doubt as expressed by the Magistrate. As recognized by the Court in its most recent opinion and Order, Plaintiff responded by causing the Court to take up its, a jury's and Defendants' time and expense, including transportation of witnesses and counsel from Dallas, Texas for trial, only to admit that proofs did not exist necessary to a trial on the merits.

8. Defendants represent to this Court that they expended in excess of $14,000.00 for reasonable attorneys fees and in excess of $6,000.00 for expenses since the February 10, 1992 Order. It is Defendants' contention that none of these expenses would have been incurred but for Plaintiff Edgar Dietrich's sanctionable conduct.

9. Defendants request that the Court review the record of this case and impose its powers under Rule 11 to assure that this sort of conduct will not occur in the future. The requirement that Plaintiff reimburse Defendants for actual costs and attorneys fees is appropriate to the purposes of the provisions of Rule 11, both from an equity and deterrent perspective. Defendants believe that Plaintiff Edgar Dietrich is a person of substantial wealth and well able to comply with such a requirement. Indeed, experience has shown that prior "substantial sanctions" (in the words of the Magistrate) were of no deterrent effect.

10. It is not Defendants' intention to prolong an already unreasonably protracted litigation and Defendants are mindful of this Court's busy docket, however, unless this Court punishes conduct of the sort evidenced by the record

and this Court's prior findings, there can be no substance to Rule 11 nor can its purposes be realized.

11. Counsel for movants has sought concurrence in the matters contained herein from counsel for Plaintiffs. Plaintiffs will not stipulate to such an Order.

WHEREFORE, DEFENDANTS request that this Court review the record of these proceedings in light of this Motion and accompanying Brief and impose appropriate sanctions under the provisions of FRCP 11, including but not limited to reimbursement of Defendants' actual costs and attorneys fees in the amount of $20,000.00.

Respectfully submitted,

/s/ Terence V. Lynam
Terence V. Lynam (P26490)
Attorney for DEFENDANTS

Dated: August 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,
SUN EXPLORATION and PRODUCTION COMPANY and
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Defendants

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS

It hardly seems necessary to brief the decisions and treatises relating to the application of FRCP 11 to the facts contained within the record of this cause. One need look no further than this Court's Opinions and Orders to find the necessary predicate for the imposition of the sanctions sought by this motion.

As noted in the Court's most recent Opinion, Plaintiffs' conduct is reprehensible and inexcusable. The effect of Plaintiffs' actions was obviously predictable. Plaintiffs succeeded in harassing Defendants, making them prepare to defend a claim which Plaintiffs knew they were unable to prove. Plaintiffs succeeded in delaying Defendants' rightful removal of the cloud created by unfounded allegations of wrongdoing which went to the very heart of Defendants business reputation. It wasn't enough that it had taken five years to gain dismissal of Plaintiffs other legally insufficient and spurious claims; Plaintiffs had to delay the final act six more months.

Plaintiffs also succeeded in enlarging Defendants' litigation costs. As a result of Plaintiffs' actions Defendants were required to:

A) Incur legal expenses:

1) to participate in the preparation of a Final Pretrial Order which included a meeting in Plaintiffs' counsel's office.

2) to attend a status conference with the Court.

3) to respond to motions.

4) to take the deposition of Ray Ellison

5) to prepare for trial.

6) to participate in the selection of a jury.

7) to appear for trial.

B) Incur other expenses:

1) to transport two witnesses and in-house legal counsel to Detroit from Dallas, Texas.

2) to accommodate them for four days.

3) to cause these employees of Defendants to put aside productive work in order to participate in activities which were a total waste of time.

It is worthy of note that the expense figures mentioned below do not reflect the costs associated with item (B)(3) above. As all these individuals are employees, the calculation of the value of their "lost time" would require even more lost time for others. Defendants believe that the fact of such loss is relevant, although reimbursement for it is not specifically sought.

Defendants' counsel is an attorney with more than fifteen years of experience with emphasis on oil and gas law. He has published articles in the publication of the Real Property Section of the Michigan Bar Association and the Eastern Mineral Law Foundation. He has been a speaker at seminars sponsored by the Michigan Bar and the Institute of Continuing Legal Education of the University of Michigan. Counsel for Defendants was retained on an hourly basis at the rate of $135 per hour. One hundred four (104) hours were expended between February 12, 1992 and the present.

Additional costs, including the cost of the deposition transcript of Ray Ellison, totaled $831.85.

Defendants costs of transportation and accommodation of witnesses and company counsel came to $5,236.98.

With regard to the deposition of Ray Ellison, Defendants contend that expenses associated with its taking are properly assessable to Plaintiffs because the deposition was taken at the request of Plaintiffs to provide testimony from an independent source which would substantiate Defendants' assertions that a clerical error had occurred. This Mr. Ellison did, but Plaintiffs chose to ignore it.

The subject of sanctions under FRCP 11 as amended is thoroughly discussed with considerable supporting citations, by the Honorable William Schwarzer in 104 FRD 181 (1985). Rather than citing the substantial authorities of which this Court must already be aware, Defendants

refer to this comprehensive article which has served as an authoritative discussion of Rule 11 sanctions.

Proceedings for the imposition of sanctions may be initiated on motion of a party. The Court has the discretion to tailor sanctions to the particular facts of the case. The Court should consider the impact of the violation. The most direct consequence is reflected in the attorney's fees and other expenses inflicted on the other side.

The rule reflects the dual purposes of compensating the offended party and penalizing the offender to achieve special and general deterrence. In this case Plaintiffs were found to have been subject to sanctions under the provisions of other rules. As noted, it would appear that the Court gave Plaintiffs the benefit of any doubt as to their motivations. Plaintiffs responded by engaging in even more obviously reprehensible conduct. While under Rule 11 it is not necessary that the court find bad faith on the part of the offending party, here Plaintiffs have, by their actions, erased any doubt as to their intentions or, in Defendants' view, any question regarding the existence of bad faith.

It is distasteful to Defendants, having achieved full dismissal after five and one half years, to have to bring this motion, but as stated by Judge Schwarzer at page 205 of the above referenced article, "[o]f all the duties of a judge, imposing sanctions. . . is the most unpleasant. But if judges turn from Rule 11 and let it fall into disuse, the message to those inclined to abuse or misuse the litigation process will be clear. Misconduct, once tolerated, will breed more misconduct. . ."

In this case the Plaintiffs obviously didn't get the message. Defendants entreat the Court to send a louder one and grant them reimbursement of their actual reasonable attorneys fees and expenses so wrongfully incurred.

Respectfully submitted,

/s/ Terence V. Lynam
Terence V. Lynam (P26490)
Attorney for DEFENDANTS

Dated: August 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
Plaintiffs,

VS.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation, and SUN OPERATING LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Defendants.

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ANSWER TO MOTION FOR FRCP 11 SANCTIONS

NOW COMES the above named Plaintiffs, EDGAR J. DIETRICH and THERESITA DIETRICH, by and through their attorney, JACK C. CHILINGIRIAN, and in answer to the

Motion for FRCP 11 Sanctions filed by the Defendants states as follows:

1. In answer to paragraph 1, Plaintiffs would indicate that the record of July 2, 1992 will clearly delineate the events that took place on the first day of trial in this matter. In further answer to paragraph 1, Plaintiffs would indicate that although there was an acknowledgment as to the Complaint and the manner and form of the contents of said Complaint relating to Count V, as to the content and the form of the Final Pre-Trial Order there is no suggestion that the requested amendment was inappropriate and that the Court lacked the power to allow such amendment thereby precluding the litigation from proceeding to its final conclusion before the Court and Jury. The Plaintiffs had preserved the right to amend their Complaint in the Final Pre-Trial Order. This alone precludes any entitlement to sanctions.

2. In answer to paragraph 2, Plaintiffs interpret the Order of the Court as not permitting out of pocket expenses, including reasonable attorney fees regardless of the admission by Plaintiffs and Plaintiffs' counsel relative to the status of proofs on the first day of trial. In further answer to paragraph 2, the Court needs to analyze the record completely to ascertain the position taken by Plaintiffs at the time of trial prior to any determination of Rule 11 Sanctions.

3. In answer to paragraph 3, Plaintiffs deny that the record of this case calls for the imposition of sanctions under FRCP 11 and further, would indicate to this Court that there is no jurisdiction with respect to such sanctions and the only authority of this Court based upon the rules is to tax costs and attorney fees which are permitted pursuant to statute and Court Rule.

4. In answer to paragraph 4, Plaintiffs deny that any responsibility should be placed upon Mr. Dietrich regardless of his status as an attorney. Further, Plaintiffs' counsel

acted properly throughout these proceedings and cannot be charged with any Rule 11 Sanctions.

5. In answer to paragraph 5, Defendants cannot rely upon what they believe Mr. Dietrich's intentions were since they would be speculating. Also, Plaintiffs and their counsel are fully protected by the attorney/client privilege as to what Mr. Dietrich ordered his attorney to do in this litigation. Plaintiffs' counsel moved promptly on behalf of his clients and in no way intended to harass the Defendants or delay the cause of action or increase the Defendants litigation costs.

6. In answer to paragraph 6, Plaintiffs would indicate to this Court that the effort at resolution by Plaintiffs to settle which was previously rejected by the Court and rejected by the Defendants cannot form the basis for any allegations of inappropriate behavior on behalf of the Plaintiffs or their counsel. In further answer to paragraph 6, Defendants were well aware of the status of the proofs in this case and at no time did they assert that the Plaintiffs were pursuing a course of harassment. Further, this Court's denial of a Motion for Summary Judgment on Count V was based upon records which clearly established production of oil not paid for. A dismissal solely on the basis of a technical defect in the pleadings or in the Final Pre-Trial Order is not equitable under the circumstances.

7. In answer to paragraph 7, the issue of the Report and Recommendation of the Magistrate cannot be raised at this point since the Plaintiff has in fact remitted those sums previously determined to be due and owing to the Defendants. This Court cannot in any way allow the Defendants to assert that Order as a reference to form the basis for any sanctions pertaining to the present motion based on events that took place at trial. In effect, it would be punishing the Plaintiffs twice and that certainly would not be equitable.

8. In answer to paragraph 8, Plaintiffs are without sufficient basis to form any belief as to the propriety of those costs that have been alleged in that paragraph. In further answer to paragraph 8, it is the position of the Plaintiffs that the Court took a restrictive view of the pleadings as well as the Final Pre-Trial Order in granting the Judgment of Dismissal on the first day of trial. Thus, the actions of Plaintiffs again cannot form the basis for any sanctionable conduct authorizing this Court to assess costs and attorney fees in the magnitude asserted by the Defendants in paragraph 8.

9. In answer to paragraph 9, Plaintiffs would indicate that several counts have been previously dismissed on Summary Judgment, all of which were of a substantial nature and all of which are now presently on appeal. With respect to Count V, it was Plaintiffs position at all times that the allegations in Count V also related to Counts I, III and IV, and provided the Plaintiffs sufficient proofs to substantiate their cause of action. The Court's granting Summary Judgment relating to Counts I, III and IV undermind the allegations in Count V. In further answer to paragraph 9, substantial sanctions are not to be utilized as a deterrent effect, but only when in fact there is a frivolous claim, all of which have not been substantiated by the Defendants throughout the entirety of these proceedings.

10. In answer to paragraph 10, Plaintiffs believe that the Defendants are seeking these Rule 11 Sanctions for the sole purpose of deterring the appeal in this matter and further, Rule 11 Sanctions can only be imposed when the Court finds and determines that there was no basis whatsoever in fact or law a cause of action or a Count in such cause of action. In the instant action, it is clear from the pleadings that were filed and from the prior denial of Summary Judgment by Judge Duggan, that the cause of action submitted by the Plaintiffs was based upon fact and law.

11. In answer to paragraph 11, Plaintiffs acknowledge that they would not stipulate to the entry of any order allowing for sanctions.

12. It is Plaintiffs' position further that since jurisdiction now vests in the Sixth Circuit Court of Appeals this Court does not have authority to act on this Motion for Sanctions.

WHEREFORE, Plaintiffs respectfully request this Honorable Court enter an Order denying the motion for sanctions since the Court is precluded from jurisdiction in this matter based upon the Sixth Circuit Court of Appeals having Notice of Appeal filed on August 4, 1992.

Respectfully submitted,

/s/ Jack C. Chilingirian
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Dated: August 20, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 87-CV-70451-DT
HONORABLE PAUL V. GADOLA

EDGAR J. DIETRICH and THERESITA DIETRICH,
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BRIEF IN SUPPORT OF ANSWER TO MOTION FOR FRCP 11 SANCTIONS

NOW COMES the above named Plaintiffs, EDGAR J. DIETRICH and THERESITA DIETRICH, by and through their

attorney, JACK C. CHILINGIRIAN, and submits this Brief in support of their Answer to the Defendants' Motion for Sanctions:

FACTS

The presentation of the facts in Defendants' briefs are a miscatag orization of what transpired from the very outset of these proceedings. Initially this case was filed in Wayne County Circuit Court and removed by the Defendants to the United States Federal District Court and the case was assigned to the Honorable Patrick Duggan.

In preliminary filings Judge Duggan denied Defendants' Motion for Summary Judgment except as to Count II. Subsequently, this Court granted summary judgment as to Counts I, III and IV. It was denied as to Count V.

During the course of the proceedings, the issue as it relates to Count V became crystal clear and in the presentation of the Final Pre-Trial Order Plaintiffs reserved the right to file a motion to amend their complaint which they did on the eve of trial.

While it is certainly within the discretion of this Court to make a determination with respect to factual assertions, it is certainly within this Court's discretion to grant a motion to amend, even after proofs are presented. A good faith effort to clear up any technical defect with respect to a pleading should not then be met with such a stinging Motion for Sanctions submitted by these Defendants.

The Plaintiffs respectfully suggest to this Court that many of the factual recitations in its recent opinion are not entirely accurate. Many of the requests for adjournment were made by agreement and stipulation of the parties. Further, this Court on numerous occasions adjourned the trial date on its own order. Suffice it to say from the time period in 1989 when this Court inherited the file until

1992 when trial commenced many of the adjournments were at the Court's insistence and not by the parties. Rather than argue over the time constraint Plaintiff would prefer to comment about the alleged insufficient and spurious claims as recited by the Defendants.

LEGAL AUTHORITY

The standard for testing conduct under Rule 11 is one of reasonableness under the circumstances. The District Court needs to inquire what was reasonable to believe at the time the pleading, motion or paper was submitted. (*Eavenson, Auchmuty and Greenwald* v *Holtzman*, 775 F2d 535 (3rd Cir. 1985).

Initially, Plaintiffs would indicate that it has been held that Rule 11 Sanctions cannot be imposed on Plaintiffs whose complaint was originally filed in State Court and later removed to Federal Court by Defendant's Petition since at the time the pleading was signed, Rule 11 did not apply and it could not be give retrospective application. (*Stiefvater Real Estate Inc.* v. *Hinsdale*, 812 F2d 805 (2nd Cir. 1987). Moreover, in the committee comments to Rule 11 it has been suggested that:

> "The revision leaves for resolution on a case by case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be filed. Ordinarily, the motion should be made promptly after the inappropriate paper is filed! and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the 'safe harbor' provisions . . . a party cannot delay filing its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)."

Further, under the Committee Comments relative to Rule is suggested that:

> "These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation."

In the instant case, Plaintiffs' counsel, at the time of the submission of the Final Pre-Trial Order, clearly preserved the right to file a motion to amend which he did so on the eve of trial. The only technical defect relating to the pleadings is a specified time period within which Plaintiffs believed that this production of oil had taken place and they attempted to correct that pleading deficiency prior to trial. When the Court indicated that it was not amenable to or would not allow such an amendment, Plaintiffs' counsel, with some degree of intellectual honesty and candor admitted that it did not have evidence to support that specific allegation recited in Count V. He did indicate that the proofs would be able to establish a time period *prior* to that reccited in Count V. Thus, it can be noted that for his candor portrayed before the Court on July 2, 1992, the Defendants are now seeking sanctions under Rule 11.

It should be clear that Plaintiffs previous reliance upon the predecessor Court's ruling on a Motion for Summary Judgment as the bsis [sic] for believing they had a viable cause of action, it should not now form the basis for a Rule 11 sanction based on a subsequent granting of a summary judgment motion pertaining to three of the four remaining Counts. All of the Counts that were dismissed formed the basis of the allegations and provided the underlying factual presentation for a submission of the record on Count V.

In the instant case, it is clear, from this Court's ruling on February 6, 1992, that the records of Sun Oil clearly suggested production of oil that had not been paid for. The only defect in the pleadings was a time frame within which this was allegedly to have occurred.

Under Rule 11, there is no longer an inquiry into the subjective good faith intent of a party. Moreover, under Rule 11 a Court must examine the objective reasonableness of the claims in light of existing law and facts. (*Michigan National Bank* v *Kroger Company*, 619 FSupp 1149 (E.D. Mich. 1985). In the instant case it is certainly arguable on an objective basis that Plaintiffs and their counsel, based on the Court's ruling relative to Count V, could reasonably conclude that a motion for an amendment to clarify defect in the pleadings would be granted. As the record should reflect and the pleadings and brief in support of the motion to amend will clearly denote this Court had the authority to make such a ruling. However, the denial of such an amendment should not now lead to the imposition of sanctions as requested by the Defendants in their motion.

Based upon the presentation as to the costs expended with no specific affidavit or presentation of facts, or documents to support such costs this Court cannot entertain the imposition of sanctions for costs and attorney fees without specifically being presented with a breakdown of those costs and attorney fees.

Further, as a result of the submission of the Notice of Appeal and the docketing of the Claim of Appeal in the Sixth Circuit it is the Plaintiffs' position that jurisdiction to hear this Motion has been lost by the Court.

Based upon the above authority, it is the position of the Plaintiffs that this motion for sanctions should be denied.

Respectfully submitted,

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Dated: August 21, 1992